IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CRWP No.1256 of 2016
Date of decision: 16th December, 2016

Rajni Aggarwal

… Petitioner

Versus

Directorate of Enforcement, Mumbai and others

… Respondents

CORAM: HON'BLE MR. JUSTICE FATEH DEEP SINGH

Present: Mr. R.S. Rai, Senior Advocate with
Mr. Anurag Arora and Ms. Rubina, Advocates
for the petitioner.

Mr. Satyapal Jain, Addl. Solicitor General of India with
Mr. Alok Kumar Jain and Mr. Dheeraj Jain,
Senior Standing Counsel for UOI
for respondents No.1 to 4.

None for respondent No.5.

FATEH DEEP SINGH, J.

"If Judges would make their decisions just, they should behold neither plaintiff, defendant, nor pleader, but only the cause itself." This was the sacrosanct quote made decades ago by the great Judge and Propounder of legal jurisprudence Henry Brockholst Livingston. Precisely it is in the light of these words that beckons this Court to adjudicate this petition preferred by the petitioner Smt.Rajni Aggarwal wife of the alleged detenue Kailash Aggarwal by invoking the jurisdiction of this Court by virtue of Articles 226 and 227 of the Constitution of India seeking appropriate writ, order or direction in the nature of habeas corpus beseeching this Court to issue a roving writ for the release of the alleged detenue, whom she terms has been kept under illegal custody.

The brief sketch of what emancipates from the records, the intense submissions made by respective counsel in prevailing upon the Court on behalf of the respective clients, needs to be re-visited as it will facilitate better understanding of what has lead to the present petition.

Undisputedly Sh.Kailash Aggarwal is the Managing Director of M/s Ark Imports Pvt. Ltd. (in short, 'the Company') which has its office in Industrial Area, Ludhiana, Punjab. The Company is primarily engaged in trading of raw-wool and wool-top. An arrangement was entered into between the Company and National Spot Exchange Limited (in short, 'NSEL') for the purposes of trading on the electronic portal around the period December, 2011 and as a consequence of which the Company was enrolled as a member of NSEL and started trading on this portal from February 2012. It needs to be highlighted here that the very purpose of electronic portal of NSEL is to facilitate trading of online goods and the actual trading is undertaken by Indian Bullion

Market Association (in short, 'IBMA') a subsidiary Company of NSEL which also has its office at Ludhiana. As per the arrangement so canvassed before this Court, all sales and purchase invoices of such members including the present Company are with IBMA. It was during the course of events, an FIR bearing No.216 dated 30.09.2013 under Sections 409, 465, 467, 468, 471, 474, 477A, 120B IPC was registered at Police Station MRA Marg, District Mumbai on the complaint of one Pankaj Saraf, an Investor of NSEL on the allegations that Directors and office bearers of NSEL had hatched a conspiracy to defraud the investors and induced them to trade on the platform of NSEL, whereby they created forged and fabricated documents by way of bogus warehouse receipts, falsified the accounts and thus, caused loss approximately assessed to Rs.202.00 lacs of the complainant and Rs.5600.00 crores of approximately 13000 investors, and by preparing forged and fake receipts of the goods/ commodities being deposited in the designated NSEL godowns they had obtained huge funds from NSEL by allegedly trading against non-existent/fictitious stock of commodities and which were sold on the exchange and the funds derived from the fraudulent sales were siphoned off. It is claimed in this FIR and is reflected from Annexure P1 that the alleged detenue was arrested on 11.08.2014 and was released on bail on 11.09.2014 in criminal complaint EOW Crime No.89/2013 for offences under Sections 409, 465, 467, 468, 471, 474, 477-A read with Section 120-B IPC and Section 3 of The Maharashtra Protection of Interest of Depositors (In Financial Establishments) Act, 1999 (in short, 'the MPID Act'). Subsequently, respondent No.1 happened to unearth the entire gamut of this so termed as dubious scandal by certain persons including the Company and as an offshoot had filed as well a complaint by way of Enforcement Crime Information Report (in short, 'ECIR') bearing No.14/MZO/2013 dated 14.10.2013 against the Directors, officials and defaulters of NSEL under various provisions of The Prevention of Money-Laundering Act, 2002 (in short, 'PMLA').

The allegations contained therein were to the effect that the Company and its group entities in all had caused a scam assessed to the tune of Rs.5600.00 crores and out of which Rs.719.37 crores were attributable to the Company, which affected 13000 investors. It was in pursuance of this complaint, summons were issued to Sh.Kailash Aggarwal to appear before the Enforcement Directorate (in short, 'the ED') on 23.09.2016 (Annexure P10) and who appeared before the ED but is alleged to have not cooperated and was evasive in the investigations and thereafter on the same day i.e. 23.09.2016 around 12.45 p.m. it is alleged that he was served with arrest orders under Section 19(1) of the PMLA which is annexed as Annexure R1/1. It would not be out of place and rather is an important component of the contentious issue that an interim order dated 05.08.2016 was passed by this Court in CRWP No.1051 of 2016 of Sh.Kailash Aggarwal and the relevant part of which order is reproduced as below:

> *"8. Let notice of motion be issued to the respondent for the bearing on 12.08.2016 to respond to the above questions and in the meanwhile the petitioner No.2 may appear before the respondent* ***and he may not be arrested****."*

In the present writ petition an order dated 23.09.2016, the order in question, was ordered to be placed on the records and thus, apparently the orders passed in the previous writ petition i.e. CRWP No.1051 of 2016 were neither extended nor made applicable in the present writ petition and it was thereafter my learned Predecessor vide order dated 26.09.2016 only directed the respondent to produce the alleged detenue Kailash Aggarwal before the Court and which never materialized till date. Mr.S.P. Jain, the learned Additional Solicitor General of India fairly concedes that there has been certainly a serious remiss by the ED in obeying the directions so passed by this Court though, certainly needs to be deprecated but the same is off the tangent at this juncture for the disposal of the main petition, for which redressal of grievance can be adequately taken to under relevant provisions of law.

It is well elaborated in the orders of this Court dated 03.10.2016 about the earlier orders dated 29.09.2016 passed by learned Court of Special Judge, PMLA, Bombay (Annexure R1/3) whereby the relief of interim bail to Kailash Aggarwal stood declined and which could not be controverted even by the learned counsel for the petitioner and therefore, by no means any order of interim bail/bail stood in operation as on that date when on 23.09.2016 Sh.Kailash Aggarwal was arrested by ED. Thus, the residual issue that needs interpretation at this juncture is the very encompass of orders of this Court passed in CRWP No.1051 of 2016 dated 05.08.2016 (Annexure P7) and the interpretation of the words *"........ and in the meanwhile, the petitioner No.2 may appear before the respondent and he may not be arrested"*.

Though, learned counsel for the petitioner has placed reliance on **'Court on its own motion v. Malook Singh' 2013(2) PLR 96** to drive home the point as has been held by a Single Bench view of this Court, has interpreted the word “meanwhile” to the effect that the stay orders so granted earlier never stood vacated by the Court and thus, by all means such an arrest in the present case is in violation of the interim protection granted by the Court.

Though by the respondent side, much emphasis has been laid down by placing reliance on **‘B.Venkata Reddy and others v. High Court of Karnataka and others’ 1996 CriLJ 909** to bring about an interpretation by a Division Bench view of the Hon’ble Karnataka High Court to interpret the expression “in the meanwhile” could only mean between those two dates and no other meaning could be contributed to it, and has understood it as an interregnum between the two points of time when certain events shall take place or not take place and has emphasized on the fact that the starting point is the date of the order when it is made and ending point is the next date of hearing, and therefore, had drawn the conclusion “in the meanwhile” could only mean between these two dates and no other meaning can be attributed to it. Thus, sufficiently answers the arguments of learned counsel for the petitioner as to the meaning assigned to these words “in the meanwhile”. What is reflected from the order dated 12.08.2016 passed in CRWP No.1051 of 2016 by this Court, that the stay on the arrest was never in existence as the learned Division Bench had not passed any order thereon subsequently to extend it and had kept the judgment reserved, whereas the petitioner has been arrested subsequently after due service of notice dated 22.09.2016 on 23.09.2016. Though some sort of controversy is sought to be created over the digits “22” which as claimed by petitioner side has been changed by overwriting, is not corroborated from the connected documents. Thus, this controversy is decided in favour of the respondent side.

Looking from another angle as is reflected from the records of this case and is well highlighted in the orders (Annexure R1/2) and had been duly conceded to at the bar by learned Additional Solicitor General that he had written a letter to the department concerned, official respondents in this case, that this Hon’ble High Court has not extended the interim orders dated 12.08.2016 and which as per Annexure R1/2 apparently shows that it was made in the presence of counsel representing the alleged detenue, leaves no scope to doubt that it was on the basis of a written legal advice/letter rendered by learned Additional Solicitor General who is also representing official respondents before this Court Sh.Kailash Aggarwal has been formally arrested after due service of notice. Thus, even if assuming that there is a remiss by the ED and the stay orders were in operation, the same cannot be attributed to them for any malicious reasons or as an outcome of malice but on account of at the most such a wrong legal advice. Even if the words "in the meanwhile" are interpreted to the contrary as per the petitioner's contentions, the same would not bind the clients on account of this wrong legal advice by their counsel.

Article 21 of the Constitution of India at the time of its draft contained the wording **that no person shall be deprived of his life or personal liberty without due process of law** but subsequently at the time of its finalization the words **"without due process of law"** stood deleted and replaced by the words **"except according to procedure established by law"**. It is by no means differed by any of the sides that under the legal jurisprudence broadly speaking there are three kinds of due process seen in the Indian constitutional law:

(i) Pure form;

(ii) Procedural due process; and

(iii) Substantive due process.

Thus, to the mind of this Court, the very purpose of these Constitutional provisions brought about by Article 21 of the Constitution of India can be adequately met with if a person has been arrested by having access to substantive justice and a finer distinction needs to be made between Article 19 of the Constitution of India which deals with protection of certain rights regarding freedom of speech etc. which is available to all citizens while Article 21 of the Constitution is available to all persons. It leads to the moot point if the alleged detention so claimed by the petitioner wife is a coerced detention or it is a recourse to substantive due process of law by the ED after following the legal advice of their counsel. No doubt, this Court cannot overlook that the specific rights, the right to life and personal liberty now captures within it a very wide gamut of rights and therefore needs to be understood in terms of claims of the aggrieved victim and the burden that the State needs to discharge to justify its infringement is that can be dependent upon case to case and there can be no straitjacket formula for that. The only guiding star would be whether it is restrictive or a deprivation thereby curbing of rights to freedom of a person and which needs to be accepted according to law.

While considering the earlier ratio laid down in the case of **'A.K. Gopalan v. State of Madras' AIR 1950 SC 27,** a seven judges' Bench of Hon'ble Supreme Court of India in **'Mrs.Maneka Gandhi v. Union of India and another' reported in 1978(1) SCC 248** have laid down the proposition that fundamental rights enshrined in part III of the Constitution are not distinct and mutually exclusive rights and each freedom has different dimensions and merely because the limits of interference with one freedom are satisfied, the law is not freed from the necessity to meet the challenge of another guaranteed freedom and therefore, held that law affecting personal liberty under Article 21 of the Constitution of India will also have to satisfy the tests under Articles 19 and 14 of the Constitution and the very doctrine of "pith and substance" was postulated and considered in depth and thus, in the present case the alleged arrest leading to so termed to be illegal detention was a direct and invariable consequence of this wrong legal advice but after effecting due service of notice thus in consonance with right to equality and fair opportunity and thus, cannot be attributable to any sinister design of the official respondents who were much guided by this legal advice. More so, prior to the arrest of the accused he was served with a legal notice and his counsel too was informed, is in itself corroborative of the fact as to lack of malice or ill-will by the ED while putting the husband of the petitioner under detention. Thus, by no means such an act of the authorities in detaining and arresting husband of the petitioner can be termed to be arbitrary, unfair, oppressive or unreasonable and rather they have acted purely and purely in consonance with the established procedure.

This Court seeking support from **'Pragyna Singh Thakur v. State of Maharashtra' 2012(1) RCR (Criminal) 302** holds the view that where an accused might be entitled to be set at liberty, if it is so that the accused at that point of time is in illegal detention by the police however, such a right is not available after the Magistrate remands the accused to custody. Thus, one can draw an analogy that right under Article 22(2) of the Constitution of India is available only against illegal detention by the police and **is not available against the custody in jail of a person pursuant to a judicial order** and thus, Article 22(2) of the Constitution of India does not operate against a judicial order.

Precisely in the present case, on 22.09.2016 by virtue of notice (Annexure P10) the accused was served with a notice and arrested thereafter at about 12.45 p.m. by virtue of (Annexure R1/1) and prior thereto when the petitioner was arrested on 11.08.2014 in MPID and was allowed bail on 11.09.2014. Though during the course of arguments, the provisions of Section 2 of MPID, there is an exception by virtue of clause (v) whereby NSEL is not included but the same being subject matter before a Division Bench, this Court refrains from going ahead into such an interpretation, nor this Court is supposed to look into whether prosecution of the detenue under various criminal laws and under different Acts is a legitimate one when they are based on same set of allegations, especially the averments of the learned counsel for the petitioner that after 13.02.2015, no fresh evidence has come on the records, are beyond the purview of this Court in this matter.

Though on behalf of the respondent, Mr.S.P. Jain has sought to harbour around the very permissibility of filing of a writ of habeas corpus by the wife but having regard to the fact that it is based on allegations of violation of fundamental rights guaranteed by virtue of Article 21 of the Constitution of India, no such legal bar can come in the way of the wife to knock at the doors of this Court, nor learned counsel for the ED could pinpoint how there has been material concealment of facts by the petitioner so claimed by him in the course of his arguments, are matters more based on unsubstantiated averments purely to arouse the passions by such a resort to theatrical innuendos.

Since the petitioner, subsequent upon his arrest on 22.09.2016, was produced within 24 hours as per requirements of Section 57 Cr.P.C. by the officers of the ED and under the provisions of Section 19 of the PMLA by following due process of law, thus, by that conduct even if there is initial remiss, the same stands rectified by such a recourse and therefore, squarely refutes the contentions that have sought to be put forth by learned counsel for the petitioner and which too was the position of law laid down by Hon'ble the Apex Court in **'Union of India and others v. Atam Parkash and another' 2009(1) SCC 585** and since at the point of time to filing of the instant petition, judicial Court has already taken cognizance and remanded the person to custody, certainly by all means washes off such a remiss which by no means goes to the roots of the case of alleged illegal detention which is purely attributable to legal advice and subsequently legitimizes the detention by all means and as is sought to be argued by learned counsel for the respondent to the submissions of Mr.Rai representing the petitioner who has canvassed that the department is guilty of contempt of Court, the ratios laid down in **B.Venkata Reddy's case (ibid) and 'Aijaz Ahmad Handoo v. State and others' 2012(3) JKJ 565** by the respondent side certainly rebuts the submissions and none of the ratios laid down in **'Kishore Samrite v. State of Uttar Pradesh and others' (2013)2 SCC 398; 'Pooja Batra v. Union of India and others' (2009) 5 SCC 296; 'Ummu Sabeena v. State of Kerala and others' (2011) 10 SCC 781; 'Ram Bali Rajbhar v. State of West Bengal and others' (1975) 4**

SCC 47; 'Shiv Kant Tripathi v. State of U.P. and others' 2014(8) RCR (Criminal) 3213; 'Mahanivesh Oils and Foods Pvt. Ltd. v. Directorate of Enforcement' 2016(2) RCR(Criminal) 611; 'Dalmia Cement (Bharat) Limited and another v. Assistant Director of Enforcement Directorate' 2016(3) ALT 189; and 'M.Shobana and others v. Assistant Director, Directorate of Enforcement' 2013(4) MLJ (Criminal) 286 comes to the aid of the petitioner side.

Thus, the expression **"oppressive or illegal detention"** which needs to be interpreted in wider sense, very liberally in this modern era, does not in any manner in the present case be of any help to the petitioner's case as it is a clear-cut case of adopting due process of law by the authorities.

Though on behalf of the petitioner Mr.R.S. Rai, Senior Advocate has sought to emphasize the fact that it is the own stand of the official respondent whereby they have moved an application for vacation of this stay on the arrest before this Court, invariably leads to the conclusion that the order in question staying arrest of the detenue was still operative, certainly to the mind of this Court has become fallacious when there has been due recourse to law by producing the person within the stipulated time before the Court of law which has remanded him, are matters which undermines the case of the petitioner.

Having regard to the fact that the Investigating Agency is probing a heinous offence of money laundering running into hundreds of crores of rupees spanning over States right from Mumbai (Maharastra) till Ludhiana (Punjab) and thus, keeping in mind the sensitivity of the issue involved which has its larger ramifications on the economy, trade and security of the Nation, such a little misdemeanor if any, can only be termed to be a small drop in this big ocean where the balance has to be struck between the State and the individual. Thus, taking a judicial balancing act and holistic approach into the matter as an epilogue to what has been detailed and discussed above, the instant petition is certainly devoid of merits and is outrightly dismissed.

(FATEH DEEP SINGH)
JUDGE

December 16, 2016
rps

Whether speaking/reasoned Yes/No

Whether reportable Yes/No