IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION
CRIMINAL BAIL APPLICATION NO. 174 OF 2017

Kailash Aggarwal ... Applicant
Vs.
1. The Enforcement Directorate)
Mumbai.)
2. The State of Maharashtra) Respondents

WITH
CRIMINAL APPLICATION NO. 90 OF 2017
(INTERVENTION)
IN
CRIMINAL BAIL APPLICATION NO. 174 OF 2017

Pankaj Ramnaresh Saraf .. Intervener
In the matter between:
Kailash Aggarwal & Anr. Applicants
vs.
The State of Maharashtra Respondent

Mr. Mahesh Jethmalani, Senior Counsel i/b. Ms. Gunjan Mangla, Advocate for the applicant.
Mr. Sandeep R. Karnik, Advocate for the Intervenor.
Mr. H.S.Venegaokar, for Respondent No.1 – CBI.
Mr. M.G.Patil,APP, for the State.

CORAM: SMT.SADHANA S.JADHAV, J.
ORDER RESERVED ON: 9th February, 2017.
PRONOUNCED ON : 28th February, 2017.

P.C.

Heard. This is an application under section 439 of the Code of Criminal Procedure, 1973.

2. It is the case of the prosecution that on the basis of a report

lodged by one Pankaj Saraf, Crime No.216 of 2013 was registered at M.R.A. Marg Police Station, Mumbai on 30.9.2013. The complainant is a Director of M/s. Vostok Far East Securities Pvt.Ltd. The complainant is in the business of investment, trading and financing. According to the complainant, his company had invested in trader's contracts offered by the National Spot Exchange Limited (hereinafter referred to as `NSEL') through its broker viz. Capital First Commodities Ltd. NSEL is a Spot Exchange. Jignesh Shah was the founder Chairman and Group CEO and was managing the affairs of NSEL along with one Joseph Massey and Anjani Sinha. NSEL owed payments to the complainant for various trades of commodities done under various contracts. However, NSEL had discontinued trading and deferred settlement by conveying to the traders that there is disequilibrium in trade. According to the complainant, the funds were diverted and misappropriated by Jignesh Shah and others and that they all induced people to make investments by making false representations and assurances and had misled the traders by issuing fabricated documents. On the basis of his report, Crime No.216 of 2013 was registered for the offences punishable under Sections 120B, 409, 465, 467, 468, 471, 474, 477A of the Indian Penal Code. Taking into consideration the gravity of the allegations and the amount involved, the investigation of the said case was transferred to the Economic Offences Wing (EOW). The said case was renumbered as Crime No.89 of 2013. The accused were also being prosecuted under Sections 3 and 4 of the Prevention of Money-Laundering Act, 2002 (for short, `PMLA').

3. It is pertinent to note that the present applicant has not been shown as an accused in the report lodged by Pankaj Saraf. The principal allegations were against the Managers and Directors of NSEL. The investigating agency had also registered an ECIR bearing No.14/2013 at Mumbai Zone on 14.10.2013. The case was also being investigated under the provisions of the PMLA. That in the ECIR, the investigating agency has given names and addresses of persons suspected. It appears from the records that on 6.1.2014, the Economic Offences Wing, Mumbai filed a comprehensive charge-sheet against the accused. There was no charge-sheet against the applicant nor any reference to the applicant.

4. On 2.6.2014, the first supplementary charge-sheet was filed. The said supplementary charge sheet also did not indicate the involvement of the present applicant. On 11.8.2014, the applicant was summoned by the Economic Offences Wing, being the Director of ARK Imports Pvt.Ltd and was shown to be arrested in Crime No.216 of 2013 dated 30.9.2013.

5. On 11.9.2014, the applicant was directed to be enlarged on

bail.

6. On 13.2.2014, the applicant was called upon to join the investigation. His statement was recorded. on 30.3.2015, the Enforcement Directorate filed a comprehensive application against 68 accused. No such complaint was filed against the present applicant. Liberty was sought for filing complaint. However, it does not appear that permission was granted by the Special Court.

7. In the meanwhile, the applicant had approached the Punjab & Haryana High Court by filing Criminal Writ Petition No.1051 of 2016, challenging the scope of Section 50 of the PMLA and had also challenged the summons issued by the Authorities. On 5.8.2016, the Punjab & Haryana High Court had issued directions to the extent that no coercive action be taken against the applicant. The applicant had joined the investigation and the applicant had retracted the earlier statements which were made under threat and coercion and had accounted for the entire liability as had not in any way acted in connivance with the Directors and Managers of NSEL.

8. On 23.9.2016, the applicant was arrested. The applicant was brought to the office of EOW at Mumbai. He was remanded to custody for 5 days i.e. till 29.9.2016. On 29.9.2016, the application seeking interim bail

was rejected by the Special Judge. On 21.10.2016, the Special Court rejected the bail application of the applicant. On 24.11.2016, an application seeking enlargement on bail under Section 167(2) of Cr.P.C. was also rejected.

9. The learned Special Court has observed that the investigation is completed and a statutory complaint under PMLA has been filed by the Registry on 21.11.2016. After the complaint was filed, the applicant had once again renewed his prayer for bail. All the co-accused were either parties to Anticipatory Bail Application or Regular Bail. Without considering the doctrine of parity, the Special Court had rejected the application filed by the applicant seeking enlargement on bail on 11.1.2017 as there was no change in circumstance. It is in the abovementioned circumstances, that the applicant has filed the present application seeking enlargement on bail.

10. The learned Senior Counsel appearing for the applicant has vehemently submitted that the applicant was in custody from 11.8.2014 to 14.9.2014 for the offence punishable under Section 409 of Cr.P.C. etc. The learned Senior Counsel for the applicant submits that as contemplated under Section 4 of the said Act, the offence under PMLA is punishable with rigorous imprisonment for a term which shall not be less than three years,

but which may extend to seven years and shall also be liable to fine. The applicant has been in custody from 23.9.2016 and, therefore, prays for being enlarged on bail.

11. The learned counsel appearing for the respondent submits that by virtue of Section 45 of PMLA 2002, it is incumbent upon the Court to record reasonable grounds for believing that the accused-applicant is not guilty of such offence and that he is not likely to commit any offence in the event of being enlarged on bail. According to the learned counsel, Section 45 place an embargo upon the Court to enlarge the applicant on bail. Section 45 reads as follows :-

> *“**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 punishable for a term of imprisonment of more than three years under Part A of the Schedule 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:"

12. As against this, the learned Senior Counsel rightly submits that a logical inference that can be drawn from the plain reading of Section 45 is that it is subject to the offences punishable for a term of imprisonment of more than three years under Part-A of the Schedule and, therefore, it would not be an impediment to enlarge the applicant on bail. It is also rightly submitted that the defining clause under Section 4 of the PMLA makes it clear that the minimum punishment contemplated under Sections 3 and 4 of the Money-Laundering Act is not less than three years but which may extend to seven years and shall also be liable to fine. The learned counsel for the respondent disagrees with the same and submits that the offences under the Schedule cannot be taken into consideration at this stage. The primary offences under the Penal Code for which the applicant is being prosecuted are Sections 465, 467, 468, 471, 474 and 477A of the IPC. Section 465 is punishable with imprisonment for a term which may extend to two years or with fine or with both. Section 467 is punishable with imprisonment of either description which may extend to ten years and fine. Section 468 is punishable for a term which may extend to seven years. section 471 is a compoundable offence and the punishment contemplated is

in the same manner as if he had forged the document. Section 474 is punishable with sentence which may extend to seven years or with life. Section 477-A is punishable for a term which may extend to life or ten years. It is in this background that the learned counsel for the respondent submits that the applicant would not be entitled to be enlarged on bail under the provisions of PMLA. The Court cannot be oblivious of the fact that Crime No.216 of 2013 was registered for the abovementioned offences and the applicant has been enlarged on bail on 11.9.2014.

13. According to the learned counsel for the respondent, it would be impossible to record a finding that the applicant may not commit a similar offence if enlarged on bail. This Court had occasion to consider similar issue in the case of **Ashok Zende vs. The State of Maharashtra (Criminal Bail Application No.1817 of 2014).** This Court had considered that what is required by the Court is that there are reasonable grounds for believing that he is not guilty of such offence and is not likely to commit any offence while on bail. \`Resonable' would mean fair and sensible. This Court had considered that the offences under PMLA of 2002 is an \`ancillary' offence. Proviso (ii) to Section 45 of the PMLA Act, 2002 does not denude the court of the discretionary powers under Section 439 of Cr.P.C. The said proviso would contemplate abundant caution while

granting bail in economic offences. `Reason to believe' is an expression of state of mind which has to be drawn by `inference'. It would cause prejudice to prosecution or defence. This Court had placed implicit reliance upon the Judgment of the Hon'ble Apex Court in the case of **Ranjitsing Brahmajeetsing Sharma vs. State of Maharashtra and Anr. AIR 2005 SC 2277.** The condition precedent under Section 21 sub-clause (4) of MCOCA is pari materia to sub-section (2) of Section 45 of the PMLA. The principal offence would be under the Indian Penal Code and the offence would also be covered by the PMLA. The said order was passed on 17.11.2014.

14. The language of Section 45 of PMLA would connote the sentence to be imposed upon the accused. At this stage, it would be relevant to consider Section 26 of the General Clauses Act, 1897. Section 26 reads as follows :-

> *"26. **Provision as to offences punishable under two or more enactments –** Where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence."*

Hence, this Court is of the opinion that at this stage, Section 45 of

PMLA would not be an embargo to consider the application for bail.

15. The learned counsel for the respondent submits that the Hon'ble Apex Court in the case of **Gautam Kundu vs. Manoj Kumar, Assistant Director, Eastern Region, Directorate of Enforcement, Government of India**, has held as follows :-

> *“Section 45 of the PMLA starts with a non-obstante clause which indicates that the provisions laid down in Section 45 of the PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. Section 45 of the PMLA imposes following two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under Part-A of the Schedule of the PMLA: (i) That the prosecutor must be given an opportunity to oppose the application for bail; and (ii) That the Court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and that he is not likely to commit any offence while on bail.”*
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> *“30. The conditions specified under Section 45 of the PMLA are mandatory and needs to be complied with which is further strengthened by the provisions of Section 65 and also Section 71 of the PMLA. Section 65 requires that the provisions of Cr.P.C. shall apply in so far as they are not inconsistent with the provisions of this Act and Section 71*

> *provides that the provisions of the PMLA shall have overriding effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. PMLA has an overriding effect and the provisions of Cr.P.C. would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PMLA will have to be complied with even in respect of an application for bail made under Section 439 of Cr.P.C.”*

There is no dispute that Section 45 begins with a non-obstante clause and has an over-riding effect. At the same time, it is clear that the provisions of Cr.P.C. are not inconsistent with the provisions under the PMLA except sub-clause (2) of section 45 of the PMLA. The Hon'ble Apex Court had also observed that it is not expected at this stage of bail that the guilt of the accused has to be established beyond reasonable doubt through evidence. In the facts of the case cited supra, the Hon'ble Apex Court had refused to interfere with the orders rejecting bail of the applicant.

16. In the present case, cognizance is taken on 24.1.2017. The principal accused and the co-accused, in similar circumstances, have been enlarged on bail and, therefore, even by virtue of doctrine of parity, the applicant would be entitled to be enlarged on bail. It appears from the records that on 24.1.2017, the Special Judge, PMLA, has taken cognizance under

section 3 read with Section 4 of PMLA 2002 against accused Nos. 1 to 4. Since the applicant was in custody, the learned Special Judge has observed as follows :-

> *"As accused No.4 is in custody and already received the copy of complaint, and additionally he is managing and administering accused Nos. 1 to 3 – company, no separate order for issue process/summons is required against the accused."*

Admittedly, on the date of arrest of the accused-applicant under the provisions of PMLA, no cognizance was taken.

17. According to the learned counsel for the respondent, taking into consideration the fact that it is an economic offence, the applicant does not deserve grant of bail. The learned counsel submits that section 45 of the PMLA is an embargo upon the powers of the Court to enlarge the applicant on bail. It is a matter of record that the applicant has been in custody since 23.9.2016. The Special Court has taken cognizance of the offence and further incarceration would amount to punitive detention and therefore the applicant deserves to be enlarged on bail.

18. A reasonable satisfaction as contemplated under Sub-section (2) of Section 45 would be construed as a similar offence contemplated under the same statute and not in another offence under the general statute

or other statutes. In the present case, the values of the properties of the applicant which are attached by the Economic Wing is much more than the liability which is indicated in the complaint against the present applicant. Moreover, the office-bearers of the accused, who are actively involved in trading on the platform of NSEL have not been taken into custody under the provisions of the PMLA. The principal accused Jignesh Shah has also been enlarged on bail Hence, the applicant deserves the same relief.

19. The observations herein are restricted to an application under Section 439 of Cr.P.C. and the same shall not be taken into consideration for the purpose of quashing of FIR, discharge application or at the time of trial.

O R D E R

(i) The application is allowed.

(ii) The applicant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.1,00,000/- (Rupees one lakh only) with one or more solvent sureties.

(iii) The applicant shall mark his presence before the Economic Offences Wing on first Sunday of each month till the conclusion of the trial.

(iv) Upon failure to attend on any two consecutive dates, the prosecution will be at liberty to file an application seeking cancellation of bail under Section 439(2) of Cr.P.C.

Application stands disposed of.

20. The Intervention application is heard, allowed and disposed of.

21. At this stage, the learned Counsel for the applicant submits that the applicant be granted provisional cash bail for a period of three weeks, within which the applicant would furnish surety to the satisfaction of the Special Court. The prayer is granted. The applicant be enlarged on provisional cash bail of Rs. 1,00,000/- and during three weeks he shall furnish solvent sureties to the satisfaction of the Special Court.

(SMT. SADHANA S.JADHAV, J.)