IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL BAIL APPLICATION NO. 1207 OF 2018

Saurabh Prabhakar Pandit … Applicant
Vs.
Enforcement Directorate & Anr. … Respondents
…
Mr. A.H. Ponda i/by Mr. Karma Vivan, Advocate for the applicant.
Mr. H.S. Venegaonkar a/w Mr. T.V. Dhatre, Advocate for Respondent No.1.
Mr. Y.Y. Dabke, APP for the Respondent No.2-State.
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CORAM : PRAKASH D. NAIK, J.
DATE : 4th OCTOBER, 2018.

P.C.

1. The applicant is seeking bail in PMLA Case No. 9 of 2017 registered by Enforcement Directorate, Mumbai arising out of ECIR/MBZO/05/2016 for the offences under Section 3 and 4 of the Prevention of Money Laundering Act, 2002.

2. Prosecution case is that on 24th December, 2015 the FIR was registered with D.B. Marg Police Station vide C.R. No. 365 of 2015 at the instance of first informant Ramchandra Venkateshwaran, Manager, IndusInd Bank, Opera House, Mumbai under sections, 420, 465, 467, 468, 471 read with 120(B) of the Indian Penal Code. The said offences are scheduled offences as envisaged under Paragraph 1 of Part 'A' of the Scheduled offences under the

Schedule of Prevention of Money Laundering Act, 2002 (herein after referred to as “PML Act”). In the FIR, it was alleged that bank account holders of IndusInd Bank viz. Yogeshwar Diamond Private Limited, M/s Shree Charbhuja Diamonds Pvt. Ltd., M/s Kanika Gems Pvt Limited, M/s. Keshav Impex and its Directors Shri Anil Kumar, Mulchand Toshiniwal, Sunil Kumar Chokhara, Anil Chokhara had conspired among themselves and submitted forged bill of entries, by virtue of which, the bank was dishonestly induced to remit Indian Currency to the tune of INR 304,35,77,609/- illegally abroad by way of cheating the bank. Thus, the offences were registered under Section 420, 465, 467, 468, 471 read with 120(B) of Indian Penal Code. The said case was subsequently transferred to EOW Unit-I and the offences were registered vide CR No. 93 of 2015. It is alleged that the said accused had committed offences under PML Act and hence Enforcement Directorate, Mumbai, registered a case under the provisions of the said Act against the accused on 11th May, 2016. It is alleged that remittances have been sent by the accused companies to foreign companies based in Hong Kong and Dubai under the guise of payments against imports of loose and rough diamonds. When the bank statements of the accused companies were perused, it was revealed that during the period from November, 2013 to March, 2014 huge amount of INR 138,80,28,144 on account of advance import payment and INR 380,43,31,848 on account of advance post import payments have been remitted to various overseas companies in the guise of payment for imports of loose and rough diamonds against which the accused companies have either not yet submitted the requisite import documents to the bank or have submitted forged import documents. There were no actual imports of loose and rough diamonds and it was 'Hawala' transaction of which Mr. Vijay Kothari was the mastermind and the other accused were conspirators. It was further alleged that an amount of INR 17,82,75,411 has been remitted to M/s Link Fai Ltd and M/s Sky Light Ltd under the pretext of payment of import of loose and rough diamonds by using fake/forged bill of entries and bogus invoices. It is alleged that the applicant is the Director of M/s Link Fai Limited and M/s Sky Light Ltd. Thus, the applicant had committed offences under Sections 3 and 4 of the PML Act. His address was not available and hence, LOC was issued on 7th April, 2017 in order to detain him. The applicant was detained by Immigration Department, Indira Gandhi International Airport, New Delhi on 27th April, 2017 and handed over to Enforcement Directorate, New Delhi. The applicant was thereafter shown arrested in the present case. After the arrest, he was transferred to Mumbai and produced before the Special PMLA Court at Mumbai on 28th April, 2017. On completing investigation, report was filed before the Court and cognizance was taken by the Court.

3. The applicant preferred an application for bail before the Special PMLA Court, Greater Bombay, which was rejected on 22nd August, 2017. The applicant thereafter preferred bail application No. 2562 of 2017 before this Court. However, in the light of the judgment of Hon'ble Supreme Court in ***Nikesh Tarachand Shah Vs. Union of India*** decided on 23rd November, 2017 which struck down Section 45(1) of the PMLA as *ultra vires* and directed that all bail applications that were rejected due to the rigors of section 45 of the PML Act were to be remanded back to the respective courts that rejected them and considered afresh, there was a change in circumstance, the applicant choose to withdraw the said application with liberty to apply before the Special Court. The said application was withdrawn on 8th December, 2017 with liberty to file a fresh application before the concerned Court. The applicant thereafter preferred fresh application for bail before the Special

PMLA Court in view of change of circumstances. The said application was rejected on 2nd April, 2018.

4. Learned advocate for the applicant submits that the applicant has been falsely implicated in this case. Applicant had never met nor personally knew any of the co-accused who were the real masterminds behind the crime. The accused companies had placed orders with some other companies and those companies have offloaded their orders onto the applicant's company. The offloaded of orders and use of his companies for shipping purpose without *mens rea* and essentially to enhance business profile. The companies were attempting to expand its business volume and allowed other companies such as Phoenix Impex, Bassilica Jewellry etc. to use the applicant's company for export. The remittances received by the Companies were paid to third parties on behalf of the aforesaid company. It is further submitted that the rigors of Section 45(1) of PML Act does not exist in view of the decision of the Hon'ble Supreme Court in the case of ***Nikesh Tarachand Shah Vrs. Union of India***[1]. It is submitted that inspite of the said decision, the application for bail preferred by the applicant before the Special PMLA Court in

1.(2018) 11 SCC 1

pursuant to the said decision was turned down by the said Court. It is submitted that applicant's residence address is at Delhi and was permanent residence at Dubai, UAE since 1999 and had been residing in Dubai for almost 18 years. Applicant was never absconding and lookout notice was issued against him without giving any opportunity to attend office of Investigating Officer. It is submitted that in the light of law laid down by the Hon'ble Supreme Court in the above case, the embargo for grant of bail enumerated under section 45(1) of the said Act will not apply to the applicant. It is submitted that maximum punishment for the offence envisaged under Sections 3 and 4 of the PML Act is upto seven years imprisonment. In several decisions of the Hon'ble Supreme Court it has been observed that Court should adopt the lenient approach to grant bail to under trial who were accused of offence which carry such imprisonment. Learned Judge of the Sessions Court has failed to take into consideration the change of law in the light of the aforesaid decision. It is further submitted that co-accused Anil Chokhara whose role in the crime is much larger and was Director in the accused companies and allegedly conspirator has been granted bail by this Court. The applicant has relied upon by the order passed by this Court granting bail to the said accused vide B.A. No. 1581 of 2017 by order dated 4th August, 2017. It is further submitted that the other persons who were Directors and in charge of and in control of other foreign companies that received funds at the behest of the accused companies have not been arrested by the prosecuting agency. The said persons / companies had received money to the tune of 34,56,797 USD have not been arrested. Learned counsel for the applicant placed reliance on the decision of Delhi High Court decided on 14th January, 2010 in B.A. No. 2381 of 2009 wherein the Court has criticized the approach of the Investigating Agency showing discrimination qua the said accused which had only chosen to record the statement of the co-accused. Learned counsel for the applicant also relied upon the order passed by this Court granting bail to Sanjay Jain who is co-accused in the present case vide B.A. No. 411 of 2018 by order dated 2nd May, 2018. Said accused was granted bail on the ground of parity on account of order granting bail to Anil Chokhara. It is further submitted that the amendment brought by the Government in the Finance Act 2018 which came into effect on 19th April, 2018 to Section 45(1) of PML Act thereby inserting words “under this Act” in Section 45(1) of the said Act would not create hurdle in granting bail. It is submitted that the said aspect has been considered by this Court in the order dated 6th June 2018 passed in B.A. No. 286 of 2018 which is relied upon by the advocate for the applicant. It is submitted that applicant is entitled for grant of bail on the ground of parity. Applicant was not accused in the original FIR registered with D.B. Marg Police Station. It is thus submitted that the applicant be granted bail.

5. Learned counsel for the Enforcement Directorate submitted that the applicant has played major role in the present crime. It is submitted that the statement of the applicant was recorded under section 50(2) of PML Act. During the investigation conducted under the PML Act, it was revealed that the applicant is Director of M/s Sky Light Limited and M/s Link Fai Limited against whom LOC was issued and he was detained at International Airport at New Delhi. In the statement, he has stated that he had formed two companies referred herein above. Those companies in the business of trading and polish of rough diamonds and said companies were subsequently dissolved in 2015. These companies were opened only for enhancing turn over. The company received huge remittances from M/s Kanika Gems, M/s Shree Charbhuja Diamonds Pvt. Ltd. and M/s Yogeshwar Diamonds Pvt. Ltd. He

had admitted that company has received payment from the Indian based companies and in many cases no export were made against such demands. It is further submitted that the applicant had refused to divulge vital information. The availability of the applicant is doubtful. It is further submitted on scrutiny of the bank accounts of the accused company revealed that during the period from May, 2013 to March, 2014 remittances of huge amount on account of advance import payments and post import payments have been remitted to overseas companies in Honk Kong in the guise of advance payment for import of diamond against which the accused companies have either not yet submitted the requisite import documents to the bank or have submitted forged documents. It was also revealed during the investigation that amount has been remitted to M/s Link Fai Limited and M/s Sky Light Limited by using forged bill of entries and bogus invoices. These were the companies of which the applicant is Director at the relevant period of time. It is submitted that during the course of investigation sufficient evidence has been collected about involvement of the applicant in the crime as a Director of aforesaid companies. The applicant has received remittance from the accused Company namely M/s Shree Charbhuja Diamond

Company and M/s Kanika Gems Pvt Ltd which are proceeds of the crime as contemplated under the provisions of PML Act. The transactions were in the nature of Hawala. It is further submitted that he was a permanent resident of Dubai. His address was not available with the Enforcement Directorate as the companies were closed. Option of issuing summons was not available and hence LOC was required to be issued against him. It is submitted that plea with regards to non-arrest of other persons who were directors of Foreign Company is devoid of merits as the arrest is prerogative of the Enforcement of Directorate as per Section 19 of the Act. Depending upon the material in possession and the reason to believe that the person has been guilty for the offence punishable under the Act, the arrest is effected. It is further submitted that applicant is not entitled for bail on the ground of parity. The co-accused Anil Chokhara was granted bail considering the fact that he was utilized by the other accused. The role played by the said accused was taken into consideration while granting bail. It is submitted that reasons for granting bail to Anil Chokhara is reflected in paragraph 10 of the order granting bail. It is submitted that in the said paragraph this Court had observed that the statement of the said accused was accepted by the

Investigating Machinery and it was established that Shri Vijay Kothari is Kingpin who was the master mind in the entire crime. Said accused was not involved in submitting forged bills of entry or any other import documents or fraudulent remittance of the foreign exchange to the Hong Kong based company. It is submitted that considering the fact that Shri Kothari was the master mind who had utilized the services of accused Anil Chokhara, bail was granted to him. It is therefore prayed that the application be rejected.

6. I have perused the documents on record. Applicant was arrested on 27th April, 2017 in pursuant to issuance of LOC. The applicant was the Director of the Companies viz Sky Light Limited and M/s Link Fai Limited. Both incorporated in Hong Kong. According to the applicant he was a permanent resident of Dubai, UAE. However, as the applicant is under incarceration over a year and since he has not visited UAE, he has lost the permanent residents at Dubai and UAE and consequently his status as a NRI. Admittedly, the applicant was not accused in the case registered with D.B. Marg Police Station vide C.R. No. 365 of 2015 which was subsequently investigated by the EOW Unit-I vide C.R.No.93 of 2015. As per the FIR which was lodged by IndusInd Bank for

offence under Sections 420, 465, 467, 468 read with 120 B of Indian Penal Code, the bank account holders namely M/s Yogeshwar Diamonds Pvt. Ltd., M/s Shree Charbhuja Diamonds Pvt. Ltd., M/s Kanika Gems Pvt. Ltd, and M/s Keshav Impex conspired among themselves by submitting forged bills of entries by virtue of which the bank was induced to remit Indian currency abroad. In the said complaint, the applicant has not been attributed any overt act. The offence of cheating and forgery were alleged against the aforesaid companies and its Directors. However, considering the fact that the aforesaid offences are scheduled offences under paragraph 1 of Part A of Scheduled Offences under the PML Act, investigation was conducted by the Enforcement Directorate under the provisions of the said Act. According to the prosecution remittance have been sent by the accused companies to foreign companies in Hong Kong, Dubai under the guise of payment for imports of loose and rough diamonds. The bank statement of the accused company revealed that payments were remitted to overseas company towards import of loose and rough diamonds and that they have submitted forged import documents. The allegations qua fabrication of document were attributed to the aforesaid Indian Companies. According to the prosecution, Vijay Kothari was the master mind and the other accused were conspirators. Apparently, applicant was arrested at the Indira Gandhi International Airport at New Delhi. It indicate that the applicant was not absconding and if he had any intention to avoid the arrest he would not have come to India. Apparently, he was not aware about the investigation conducted by the agency, as no summons was issued to him. Primary issues which is required to be considered is that while investigation was initiated and the report was filed before the Special Court, the rigors of Section 45(1) for grant of bail were prevalent. However, in the decision of Nikesh Tarachand Shah (supra), the Apex Court has struck down the said provision. It is pertinent to note that the maximum punishment for the offence envisaged under Sections 3 and 4 of PML Act is upto seven years and imprisonment. The applicant is in custody from 27th April, 2017. Further detention of the applicant is not necessary. Investigation is completed and chargesheet is filed. There is no question of any further recovery at his instance. It is the case of the applicant that he has never met nor personally knew any of the co-accused who were the real masterminds behind the crime. It is contended that accused companies had placed orders with some other companies and those companies have offloaded their orders onto the applicant's company and these companies were used for shipping purpose and accordingly, establishments were undertaken by this company. Co accused Anil Chokhara has been granted bail by this Court. It is true that while granting bail to the said accused it was observed that Vijay Kothari is the Kingpin and mastermind in the entire money laundering and fraudulent laundering of the foreign exchange to Hong Kong based company by submitting forged bills of entries and other import documents to the bank. The prosecution has accepted that Mr. Kothari is the mastermind in the fraudulent transaction. Primary role was attributed to him. It is true that Anil Chokhara has been granted bail, in the circumstances that he was induced to become Director of M/s Kanika Gems Private Limited at the instance of Vijay Kothari. The fact remains that Anil Chokhara is granted bail prior to decision in the case of Nikesh Shah. Considering the submissions advanced on behalf of the said accused, applying the principle enunciated in the case of ***Ranjit Singh Sharma Vs. State of Maharashtra and others***, bail was granted to the said accused. Accused Sanjay Jain was granted bail by this Court in B.A. No. 286 of 2018 dated 6th June, 2018. It is not the case of prosecution that the applicant had forged any bills of entry or any import documents nor has the applicant caused any inducement. In the aforesaid circumstances, further detention of the applicant is not necessary and he can be released on bail on certain terms and conditions. Hence, I pass the following order.

ORDER

i) Bail Application No. 1207 of 2018 is allowed;

ii) Applicant is directed to be released on bail in connection with ECIR/MBZO/05/2016 registered by Directorate of Enforcement, Mumbai, on his furnishing P.R. Bond in the sum of Rs.1,00,000/- with one or more sureties in the like amount;

iii) Applicant is directed to report Directorate of Enforcement, Mumbai once in a month on first Saturday of the month between 11:00 a.m. to 01:00 p.m. till further orders;

iv) Applicant shall not leave the country without permission of the Court;

v) Applicant is permitted to furnish cash surety of Rs.1,00,000/- in lieu of surety for a period of four weeks from today;

vi) Bail Application No. 1207 of 2018 stands disposed off.

Sachidanand Kuttan Nair

Digitally signed by Sachidanand Kuttan Nair
Date: 2018.11.16 16:10:01 +0530

(PRAKASH D. NAIK, J.)