IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M No.37091 of 2019 (O&M)
DATE OF DECISION : 15th OCTOBER, 2019

Bharat Kumar Mardia

…. Petitioner

Versus

Serious Fraud Investigation Office (SFIO)

…. Respondent

CORAM : HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

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Present : Mr. R. Ramesh, Senior Advocate with
Ms. Suchitra Kumbhat, Advocate and
Mr. Manav Bajaj, Advocate for the petitioner.

Mr. Chetan Mittal, Asstt. Solicitor General of India with
Mr. Alok Kumar Jain, Senior Panel Counsel for SFIO and
Mr. Prashant Baliyan, Deputy Director, SFIO, Delhi.

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RAJBIR SEHRAWAT, J. (Oral)

1. The present petition has been filed by the petitioner under Section 438 Cr.P.C. 1973 for grant of anticipatory bail in complaint case No.5 of 2019 dated 18.05.2019 registered under Section 58A of Companies Act, 1956 (hereinafter referred to as Old Companies Act) and Sections 74(3) & 76A of Companies Act, 2013 (hereinafter referred to as the New Companies Act).

2. Brief facts of the case are that one multi level cooperative society was got registered by one Mukesh Modi and family in the name of Adarsh Credit Cooperative Society Limited (hereinafter referred as 'Cooperative Society'). That Cooperative Society collected deposits from about 22 lacs investors. In the process, an amount of rupees 9253 crores approximately, was collected from the general public. After collecting this money from the public, Mukesh Modi and family created

number of companies, with their associates and relatives as the Directors. Subsequently these companies were advanced loan by the above said Cooperative Society. These loans, though were required to be returned with interest; specified in the documents of loan, however, the same were not returned by the companies. One of these companies was Sambhav Energy Limited (hereinafter referred to as 'SEL'), incorporated with its registered office and Chennai. In this company, Mukesh Modi and his associates/relatives were also the Directors. The petitioner was also a Director in this company from the year 2005 onwards; till 2017. Besides being a Director, the petitioner was also equity holder to the extent of 6% in this company; up to the year 2011. The company SEL had also availed a loan of about 62 crores from the above said Cooperative Society. The company SEL received loan from the Cooperative Society from the year 2013 onwards and continued to get loans up to the year 2016. However, the company SEL had neither repaid the principal amount nor the interest accruing thereon. Therefore, the company continued to be in default. When the money of the Cooperative Society was being siphoned off in the form of loans to the companies of Mukesh Modi and associates, the matter came to the knowledge of the Central Government. Hence, the Central Government, through Ministry of Corporate Affairs, vide order dated 20.06.2018, passed in exercise of powers conferred under Section 212 (1)(c) of Companies Act, 2013 and Section 43(2) & (3)(c)(i) of LLP Act 2008, ordered an investigation into the affairs of the companies through the Serious Fraud Investigation Office (hereinafter referred to as 'SFIO'), which is an instrumentality created under the Companies Act for investigation into the affairs of the companies. During the investigation a total of about 125 companies were taken under investigation (hereinafter referred to as 'CUI'), including the company of the present petitioner i.e. Sambhav Energy Limited. The SFIO investigated the matter. Thereafter, the SFIO presented the report before the Special Court at Gurugram. Under the provisions of Section 212 (15) of the Companies Act 2013, such report is to be taken as a report presented under Section 173 of Cr. P.C. After receipt of the report from the SFIO, the Special Court summoned various accused including CUI and individuals, under different Sections of the old and new Companies Act. But during the investigation the investigating officer had not arrested several of the accused, including the present petitioner. Since the petitioner was also summoned for commission of offence under Section 58A of the old Companies Act, 1956 and Section 74(3) and 76A of the Companies Act, 2013; and since the offences are non-bailable, therefore, apprehending his arrest, the petitioner had moved the court below seeking anticipatory bail. However, the anticipatory bail has been declined by the Sessions Judge, Gurugram vide order dated 28.08.2019. Hence the present petition has been filed.

3. While arguing the case, learned counsel for the petitioner submitted that the Special Court has categorized the companies and the individuals according to the allegations of set of offences against them. Name of the petitioner does not find mention in the list of offenders for offence punishable under Section 447 of the new Companies Act. It is further submitted that otherwise also the Central Government has issued

notification specifying the offences punishable under Section 447 of the new Companies Act. A total of 18 offences have been specified which are to be punishable or covered under Section 447 of the new Companies Act, by deeming fiction. The offences alleged against the petitioner do not fall in the Sections enumerated in the notification. Hence, in the case of the petitioner, rigor of twin conditions, as prescribed under Section 212(6) of the new Companies Act, is not attracted.

4. It is further contended by the counsel for the petitioner that since the office of the company of the petitioner, namely, Sambhav Energy Limited, is situated at Chennai, therefore, the Special Court at Chennai only shall have the jurisdiction to entertain the complaint qua company offences, as prescribed under the new Companies Act itself. Hence, the court at Gurugram does not have any jurisdiction even to summon the petitioner, much less to speak of taking the petitioner into custody. Therefore, it is submitted that since the order of summoning itself is without jurisdiction, therefore, the petitioner should be protected against the unauthorized attempt of the respondent to ensure that the petitioner is taken into custody.

5. Still further, it is submitted by counsel for the petitioner that even the circumstances of the case do not point out any positive participation of the petitioner in the alleged offences. The counsel has pointed out that although the petitioner was equity holder to the extent of 6% earlier, however, the petitioner had sold his equity share to one Mr. Virender Modi etc. as per MOU dated 25.07.2011. By this date the

company of the petitioner had not even availed any loan from the above said Cooperative Society. The loan started only from the year 2013 and continued onwards. Hence, the petitioner is not liable to repay the loan as such, in his capacity as equity holder of the company. Still further, it is submitted that although the petitioner was a Director in the company from 17.10.2015, however, the petitioner had resigned as a Director on 23.03.2017. Even this had happened much before the initiation of the investigation by the SFIO; taking the transaction of loan as fraudulent one. So far as, the recovery of the loan, is concerned, it is pointed out by the petitioner that the proceedings have already been initiated before the National Company Law Tribunal, although this has been done after starting of investigation by the SFIO. Since the loan was availed by the company, therefore, it is the company who is liable to pay and shall be bound to pay, as per the law. Hence, the petitioner is not liable for any offence in this matter.

6. So far as the personal credentials of the petitioner are concerned, it has been pointed out by the counsel for the petitioner that the petitioner is a Post-Graduate in Engineering. He was trained at Government expenses in Bio-Mass energy. The petitioner had created a model for production of Bio-Mass energy. The company, Sambhav Energy Limited had taken up the business of Bio-Mass energy. Therefore, only to see his scientific and technical dream of helping the public, come true; the petitioner had joined and continued as a Director in the company. Even the loan was availed to facilitate the business of the company. The company, in fact, supplied the Bio-Mass energy to the

Government of Rajastha for quite some time. Hence, the company, with which the petitioner was associated, was not a sham company. However, when the company was not moving forward in the right direction, the petitioner had left this company; in all his capacities. The counsel for the petitioner has also pointed out that although the petitioner remained associated with the company SEL, however, the petitioner had never received any remuneration from the company as Director. He had only invested in the share capital of the company; at the first instance and at the initial stage. But even that equity was later on sold by him to the main controllers of the company. Even on account of equity held by the petitioner, the petitioner, did not avail any benefit in cash or kind from the company. Hence, it is submitted by the counsel for the petitioner that from the alleged loan availed by the company, the petitioner has not drawn any benefit, monetary or otherwise, from his association with the said company. Still further it is submitted that the petitioner is not involved in any other case of any kind. Even with the present company, the petitioner was involved only as a technical expert in the pursuit of his scientific and technical dream, having nothing to do with the financial benefits. Therefore, the petitioner is totally innocent person. The chargesheet has already been filed before the Court. The petitioner is not required for any investigation purposes. The petitioner undertakes to appear before the trial Court to face further proceedings, in accordance with law. Hence, the petitioner deserves to be protected against his arrest.

7. On the other hand, the counsel for the SFIO filed reply in which it is pleaded; and is also so argued by the counsel; that the petitioner was a Director of the company SEL, which had availed the loan from the Cooperative Society. The said loan has not been repaid by the company. Since the loan taken by the company during the tenure of the petitioner as a Director, has not been repaid, therefore, the chargesheet has been filed against the petitioner under Section 58A of the old Companies Act and since the said loan remain unpaid even after incoming of the new Companies Act, therefore, the petitioner has been chargesheeted under Section 74(3) of the new Companies Act. It is further contended by the counsel for the SFIO that although the rigor of twin conditions, as prescribed under Section 212(6) of Companies Act, is not invited in the case against the present petitioner, however, since the petitioner was a Director during the term when the loans were availed and continued to be so when the loans were not repaid by the company, therefore, the petitioner is not entitled to any anticipatory bail. The petitioner has acted in collusion with Mukesh Modi and his associates in taking loans from the Cooperative Society, which has neither been repaid nor were ever intended to be repaid by the company of the petitioner. So far as the point of jurisdiction, is concerned, the counsel for the SFIO has submitted that the matter has already been considered by the Hon'ble Supreme Court in relation to the present matter only; and it has been held in the case of ***Serious Fraud Investigation Office v. Rahul Modi, (2019) 5 SCC 266*** that since the office of the main company involved in the fraud, namely, Adarsh Group of Companies, is situated at Gurugram,

therefore, all the offences arising from the activities relating to that company or its subsidiaries or their co-conspirators in the chain of sequences, can be tried at Gurugram, therefore, the court at Gurugram shall have the jurisdiction. The counsel for the SFIO has further relied upon the judgment of the Hon'ble Supreme Court rendered in the case of ***Satpal Singh Vs. State of Punjab, (2018) 13 SCC 813,*** to contend that protection under Section 438 Cr.P.C. is available to the accused only till the Court summons the accused or the accused is produced or appears before the court to face the chargesheet. Once summoned/appeared, the accused has to surrender to the jurisdiction of the trial court and seek regular bail under Section 439 Cr.P.C. Accordingly, it is submitted that since the charge-sheet is already filed before the trial Court by the investigating agency, therefore, the present petition itself is not maintainable.

8. As a specific query from the Court, the learned counsel for the SFIO has not categorically denied the fact that the petitioner was not a signatory to anyone of the resolutions for taking loans from the above said Cooperative Society. However, the learned counsel for the SFIO argued that the petitioner is not being prosecuted as 'officer in default' as defined under Section 2(60) of the Companies Act. He is being prosecuted only in his capacity as a 'Director'. Therefore, whether he has any active participation or not, in the process of availing of the loan, the petitioner would be liable by default, being a Director. Still further relying upon the judgment of the Hon'ble Supreme Court in case of ***Serious Fraud Investigation Office Vs. Nittin Johari and another***

passed in ***Criminal Appeal No.1381 of 2019***, the counsel for the SFIO has submitted that the economic offences constitute a different class in itself. Therefore, the persons accused of economic offence has to be dealt with on different parameters; because in these offences swindling of the public money, by taking advantage of the cloak of the legal procedures is involved. Since the petitioner was also a Director of the company which has defrauded the Cooperative Society, therefore, the petitioner does not deserve any concession of anticipatory bail.

9. Having heard learned counsel for the parties, this court finds substance in some of the arguments of the learned counsel for the petitioner, while some other arguments are liable to be noticed only to be rejected. So far as the argument of counsel for the petitioner qua the jurisdiction of the court at Gurugram, is concerned, this court does not find any substance in the same. Rather, this court finds substance in the argument of the learned counsel for the SFIO, wherein by relying upon the judgment of the Supreme Court he has submitted that the courts at Gurugram have the jurisdiction. As held by the Hon'ble Supreme Court, since the office of the main company, controlling all the companies involved in the fraud, are situated at Gurugram, and all other co-conspirators are participants in the chain of sequences, constituting the offences, therefore, it cannot be said that the Special Court at Gurugram does not have the jurisdiction.

10. The next question is whether the petitioner is entitled to be protected against his arrest or not. In this regard, this court is of the view that although right to seek anticipatory bail is not a fundamental right, yet

an individual is having a right to life and liberty, as granted by Article 21 of the Constitution of India. However, the said right can very well be curtailed by the procedure established by law. The normal procedure for curtailing the liberty of a person accused in offence is that the accused can be arrested even without warrants from the court. Same is the situation under the new Companies Act as well and the authorized officer/designated officer can arrest a person even without warrants issued from a court. However, to ensure that an innocent person is not unduly harassed by taking him into custody, the courts have been conferred a special power under Section 438 Cr. P.C. But this power has to be exercised by the courts, keeping in view that there are mitigating circumstances, showing the *ex facie* innocence of the accused *vis-a-vis* the allegations leveled against him and further, that in case the accused is granted protection, the investigation of the case would not be unduly hampered. So far as the present case is concerned, the investigation of the case is already complete. The investigating officer of the case had not even considered it appropriate to arrest the petitioner during the investigation. Therefore, the investigation of the case is not going to be hampered in any manner if the petitioner is granted concession of anticipatory bail. So far as the allegations against the petitioner are concerned, this court is of the considered opinion that for the purpose of anticipatory bail, the petitioner has been able to explain his position to a considerable degree, so as to make this court exercise its power under Section 438 Cr.P.C.; for protecting him against his arrest.

11. As has come out in the fact of this case, although the petitioner was equity holder in the company right from the beginning in the year 2005, however, he had already sold his equity in the year 2011 to Mr. Virender Modi and associates, thereafter the petitioner had no interest in the business of the company as equity holder. Up to this time the alleged fraudulent loan had not been availed by the company SEL. As is submitted by the petitioner, the petitioner was continuing with the company as a Director, only to see his scientific dream being materialized through the project of production of Bio-Mass energy, in which the company SEL was engaged. This is not even disputed by the SFIO that there is nothing on record to show that petitioner had ever drawn any benefit, pecuniary or otherwise, from the business of the company. Even the case of the SFIO is that the petitioner is being prosecuted only because of he being a 'Director' of the company from the year 2005 till 2017. However, again, it is not even disputed that the petitioner had already resigned from the company much before the business of the company was adjudged by the SFIO to be fraudulent and found involved in non-payment of the loan availed by the company. In any case, whether the petitioner would be liable in his capacity as a Director or not, is a subject matter of the trial. Only for this reason it may not be appropriate to jeopardize the right of the petitioner to liberty. Hence, this court is of the considered opinion that the petitioner can safely be extended be benefit of protection against his arrest.

12. Although the learned counsel for the SFIO has relied upon the judgment of Hon'ble Supreme Court rendered in ***Satpal Singh***

(supra), however, this court finds the said judgment to be totally distinguishable on the facts of the present case. In that case the person was already on anticipatory bail and the Supreme Court had clarified that the anticipatory bail can continue only till the report under Section 173 Cr.P.C. is filed against the accused. Thereafter the accused has to seek regular bail from the court. There can not be any dispute with this proposition of law which has been reiterated in this judgment. However, in the present case the petitioner had never been granted anticipatory bail by any court. The petitioner was not even apprehending his arrest so far; despite the investigation being over. The apprehension has arisen only from summoning order issued by the Court for non-bailable offences. Therefore, the petitioner is seeking protection against his arrest; so as to appear before the trial court to face further proceedings in accordance with law. Hence, on its own facts, the present case stands on altogether a different footing. As observed above, if no active role is alleged against the petitioner in the alleged offence and if he is not required for any investigation purposes, then it would not be appropriate to leave the petitioner to be taken into custody. After all the fundamental right to life and liberty, granted by the Constitution of India, cannot be bartered for the peanuts. If the petitioner is, ultimately found guilty by the trial court, he would be very much there to suffer sentence for the same in accordance with law. But it would not be reasonable to make him suffer incarceration even before he is adjudged guilty, particularly with reference to the facts as state above.

13. Although even the counsel for the SFIO has not disputed the fact that the twin conditions, as prescribed under Section 212 (6) are not attracted in the case against the petitioner, however, keeping in view the education, antecedents and character of the present petitioner, this court is of the opinion that the petitioner is not likely to flee from the course of justice. There is nothing on record to suggest that if the petitioner is granted concession of anticipatory bail, he would influence any witness in the case. As stated above, he had already left the company much before the start of the investigation.

14. In view of the above, the present petition is allowed. The petitioner may appear before the trial court on or before the next date of hearing fixed before the trial court. It is further directed that in case the petitioner so appears, then the petitioner shall not be kept in custody in this case; at this stage. The petitioner shall be released on bail; at this stage; by the trial court on his furnishing bail bonds/sureties to the satisfaction of the trial Court/Duty Magistrate.

15TH OCTOBER, 2019 **(RAJBIR SEHRAWAT)**
'raj' **JUDGE**

Whether speaking/reasoned: Yes No
Whether Reportable: Yes No