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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved on: 17.10.2019

Pronounced on: 23.10.2019

+ BAIL APPLN. 2484/2019, CRL.M.A. 37260/2019 and CRL.M.A. 38212/2019

D.K. SHIVAKUMAR

..... Petitioner

Through: Dr. Abhishek Manu Singhvi, Mr Rakesh Khanna, Mr Dayan Krishnan, Sr. Advs. along with Mr Mayank Jain, Mr Parmatma Singh and Mr Madhur Jain, Advs.

versus

DIRECTORATE OF ENFORCEMENT

..... Respondent

Through: Mr K.M. Natrajan, ASG, Mr Amit Mahajan, CGSC, Mr Sharath Nambiar, Mr Anmol Chandan, Mr Mohammad Faraz, Mr Kunal Dutt, Ms Mallika Hiremath and Ms Nidhi Chaudhary, Advs. with Mr Saurabh Mehta, Assistant Director

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

J U D G M E N T

1. Present bail application has been filed under Section 439 Cr.P.C. r/w Section 65 PMLA, 2002 on behalf of the petitioner in ECIR/04/HQ/2018.
2. The petitioner was arrested on 03.09.2019 and remained in custody of

the Enforcement Directorate, New Delhi, for 15 days and is presently in judicial custody in Tihar Jail, New Delhi.

3. The instant petition u/s 439 Cr.P.C. is maintainable by virtue of Section 65 of the PMLA which provides that the provisions of Cr.P.C. shall apply, in so far as they are not inconsistent with the provision of the PMLA.

Section 65 of the PMLA is reproduced hereunder:-

*"65. Code of Criminal Procedure, 1973 to apply.—
The provisions of the Code of Criminal Procedure, 1973
(2 of 1974) shall apply, insofar as they are not inconsistent
with the provisions of this Act, to arrest, search and
seizure, attachment, confiscation, investigation,
prosecution and all other proceedings under this Act."*

4. Brief facts of the case are that a search u/s 132(1) of the Income Tax Act was conducted on the premises of the Petitioner and other persons on 02.08.2017 in New Delhi and other places. During the course of search, at the premises of the Petitioner in Delhi at B-2/107, Safdarjung Enclave, New Delhi, an amount of ₹41,03,600/- was recovered in cash. The Petitioner explained the source of the aforesaid money having been reflected in the return of income filed by the Petitioner for A.Y. 2018-19.

5. Thereafter, the Income Tax Department filed 3 complaints against the Petitioner before the Special Court, Bengaluru, u/s 200 Cr.P.C. alleging offences under the Income Tax Act. Pursuant thereto, the Income Tax

Department proceeded to grant sanction to prosecute for offences punishable u/s 276C(1) and 277 of the Income Tax Act and section 120B of I.P.C and filed a 4th complaint against the Petitioner under section 200 Cr.P.C. Thereafter, the Special Court, Bengaluru took cognizance and proceeded to register a complaint against the Petitioner u/s 276C(1) and 277 of the IT Act and section 120B, 193 and 197 of I.P.C.

6. On 29.08.2018, an ECIR i.e ECIR/04/HQ/2018 was registered by the Enforcement Directorate, Delhi. Subsequently, on 17.01.2019, the respondent issued summons to the Petitioner u/s 50 of the Prevention of Money Laundering Act, 2002 on the basis of ECIR/04/HQ/2018.

7. Thereafter, the Petitioner challenged the summons issued u/s 50 of the Act, before the High Court of Karnataka at Bengaluru in W.P. No. 6210/2019. The High Court was pleased to dismiss the said writ petition vide judgment dated 29.08.2019. The respondent issued another summons u/s 50 of the Act on the same day i.e. 29.08.2019 at 9.40 PM at the residence of the Petitioner in Bengaluru, to appear before him on the next date i.e. 30.08.2019 at 1PM in Delhi. The Petitioner participated in the said summons for 4 days (33 hours) continuously and on 03.09.2019, the Petitioner was arrested by the Enforcement Directorate.

8. The petitioner was admitted on 4 occasions since his arrest in the RML Hospital complaining of chest pain, high BP and other ailments. Even after discharge from the hospital the petitioner had grossly fluctuating BP and was diagnosed with unstable angina. However, on 25.09.2019 the Ld. Special Court, Rouse Avenue Court Complex, rejected the bail application of the present Petitioner.

9. Dr. Abhishek Manu Singhvi, learned Sr. Advocate appearing on behalf of the petitioner submitted, the offences under Section 276C(1), 277 of the Income Tax Act and Section 193, 199 r.w.s. 120B IPC that have been alleged against the Petitioner do not constitute a predicate offence as per the schedule given in the PML Act. The offence contained in Section 120B IPC alleged against the present Petitioner cannot be used as a standalone predicate offence in the absence of any other schedule offence under the IPC or any other penal statute to make out a case against the Petitioner of money laundering under the PML Act. Moreover, there is no conspiracy to commit a 'Schedule Offence' and therefore, there is no question of invoking the provisions of PML Act on the basis of Section 120B IPC alone. Furthermore, the High Court of Karnataka in its judgment dated 29.08.2019 in W.P. No. 6210/2019, left the question w.r.t Section 120B open as regards

the question of commission of criminal conspiracy to commit as scheduled offence under the PML Act. However, a conjoint reading of section 2(1)(u), 2(1)(x), 2(1)(y) and 3 of the Prevention of Money Laundering Act, 2002, reveals that the offence of money laundering, and the concept of proceeds of crime is necessarily relatable to the existence of a schedule offence.

10. Dr. Singhvi, submitted that the concept of conspiracy is not something unknown to criminal law. It is a settled proposition that conspiracy requires an offence and there cannot be a conspiracy for conspiracy, however, it should lead to an illegal act or act which is not illegal to be done by illegal means. While there is no quarrel with the proposition that Section 120B is a substantive offence, but it doesn't mean that without an existence of another offence or an agreement to conduct another offence, the offence of conspiracy can be said to be made out. In other words, a person cannot conspire to conspire. Section 120B is substantive for the purposes of punishment which is clear from Section 120-B (1) which says that punishment will be done in the same manner as the abetment of 'such offence'. Further, provides that whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as set out

in Section 120-B(1) shall be punished with imprisonment of either description for a term not exceeding six months.

11. Learned senior counsel for petitioner, thus, further argued as under:-

i) In the context of Prevention of Money Laundering Act, 2002, the offence has to be read as Scheduled Offence.

(ii) An abettor has to be an abettor of an offence, and in the context of the Prevention of Money Laundering Act, 2002, a scheduled offence. Reference in this regard may be made to Section 108, Indian Penal Code, 1860.

(iii) If it is an admitted position that none of the offences are scheduled offences, even if recourse is made to Section 120 -B (2) then the maximum punishment is 6 months. Thus, if the case of the ED is taken as correct, that in the context of Section 120 -B it is a substantive offence without an offence, then only 6 months imprisonment is awardable the offence is bailable.

(iv) If there is no offence, that is a scheduled offence, there can be no proceeds of crime and at the highest if one accepts that 120B(2) is stand alone it will result in bail being automatic as the same is a bailable offence for that the Petitioner has been discharged by the

Special Court, Bengaluru vide order dated 28.02.2019 in 3 complaints filed by the Income Tax Department, pursuant to the aforesaid search dated 02.08.2017. No proceedings under the PML Act much less an arrest could have been initiated in the facts of the present case in as much as when the 4th prosecution complaint filed u/s 200 Cr.P.C. by the Income Tax Department alleging only predicate offences u/s 120B IPC, has been stayed by the High Court of Karnataka vide order dated 20.08.2019.

12. Learned senior counsel further argued that the twin conditions mentioned in Section 45 of the PML Act continue to be struck down as being unconstitutional in view of the judgment of the Apex Court in the case of *Nikesh Tarachand Shah vs. Union of India*(2018) 11 SCC 1. The amendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term 'offence punishable for 3 years' with 'offence under this Act'. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment. Reliance is placed upon the judgment of Delhi High Court in the case of *Upendra Rai vs. Directorate of Enforcement* (Bail Application No. 249/2019).
13. Since the twin conditions for bail in section 45 of the PML Act have

been struck down by the Hon'ble Supreme Court and the same are neither revived nor resurrected by the Amending Act therefore, as of today there is no rigor of said two conditions under original Section 45(1)(ii) of the PML Act for releasing the Petitioner on bail. The provisions of section 439 of Cr.P.C and the conditions therein will only apply in the case of the Petitioner for grant of bail.

14. Dr. Singhvi also submitted that the Petitioner has been elected seven times as a member of Legislative Assembly, State of Karnataka and is former minister of energy, water and power. The Petitioner has deep roots in the society and admittedly, is not a flight risk. Reliance is placed upon the judgment in the case of ***R.Vasudevan vs. CBI, BAIL APPLICATION NO. 2381/2009***, wherein this High Court considering the high position and deep roots of the accused, granted bail. The present petitioner has no criminal antecedents and has never been convicted for any cognizable offence. Thus, there is no question of repeating the offence in any manner, whatsoever. There is no allegation in this case of tampering of evidence or influencing the witnesses.

15. Moreover, the offences punishable under Section 276C (1) and Section 277 of the Income Tax Act, 1961 are compoundable offences u/s 279(2) of

the Act which shows that the offences are not serious in nature. The Delhi High Court in the case of *Sitaram Aggarwal vs. Customs, (2005) 79 DRJ 554* held that, in case of compoundable offences, bail should be granted.

16. The Hon'ble Supreme Court in the case of *Dataram Singh vs. State of Uttar Pradesh & Ann, (2018) 3 SCC 22* held as under:

"i. A fundamental postulate of criminal jurisprudence is the presumption of innocence, meaning thereby that a person is believed to be innocent until found guilty. However, there are instances in our criminal law where a reverse onus has been placed on an accused with regard to some specific offences but that is another matter and does not detract from the fundamental postulate in respect of other offences. Yet another important facet of our criminal jurisprudence is that the grant of bail is the general rule and putting a person in jail or in a prison or in a correction home (whichever expression one may wish to use) is an exception. Unfortunately, some of these basic principles appear to have been lost sight of with the result that more and more persons are being incarcerated and for longer periods. This does not do any good to our criminal jurisprudence or to our society.

17. The Hon'ble Supreme Court in *"Arnesh Kumar Versus State of Bihar (2014) 8 SCC 273"* which makes it mandatory that in any case where the offence is punishable with imprisonment for a term which may extend to 7 years, the accused may not be automatically arrested and the Magistrate may not authorize the detention casually and mechanically.

18. In addition to above all discussed, undisputedly, the Petitioner has been hospitalized 4 times in the past 3 weeks and has been diagnosed with hypertension, diabetes, hypothyroidism, electrolyte imbalance. The Petitioner was kept in Cardiac Care Unit (CCU) and as the Petitioner complained of chest pain, Angiography was also performed on the Petitioner on 18.09.2019.

19. Moreover, the proviso to Section 45 of the PML Act, provides that in case of sick person, bail should be granted to the person arrested.

20. On the other hand, Mr. Natrajan, learned Additional Solicitor General of India submitted that the present case involves the commission of grave economic offence of laundering of the proceeds of crime by the petitioner and his associates through a series of transactions and projecting the ill gotten proceeds as untainted.

21. The Income Tax Investigation Directorate of Karnataka has conducted searches on the petitioner and his associates on 02.08.2017 at various places which led to seizure of (cash, loose sheets, diary & several incriminating material connected with criminal conspiracy) from premises under control of the petitioner and his associates. The scrutiny of transactions recorded in incriminating documents revealed unaccounted cash transactions and its

laundering running into at least ₹143 Crores. During course of search, statement of several persons including petitioner and his associates were recorded by the Income Tax Department.

Details of cash seized during Search

S. No	Name and address of the premises	Amount of cash seized Rs.
a.	Flat No.01, Karnataka Govt. Staff Quarters, Sector-6, R.K. Puram New Delhi.	12,44,900
b.	No. 17, B-4, Safdarjung Enclave, New Delhi.	1,37,36,500
c.	No. 107, B-2, Safdarjung Enclave, New Delhi.	41,03,600
d.	No.201,B-5, Safdarjung Enclave, New Delhi. a) From the room of Sh. D.K. Shivakumar b) From the room of Sh. Sunil Kumar Sharma Total	6,61,26,000 7,58,100 6,68,84,100
	Grand Total Rs	8,59,69,100

22. Further submitted, the scrutiny of transactions recorded and

incriminating documents revealed that illicit and unaccounted cash at least ₹143 crores were generated by the petitioner in criminal conspiracy with his associates. Out of said generated amount, a small part of ₹8,59,69,100/- was found and seized during search. Sh. Anjaneya Hanumanthaiah is the person who manages and maintains the tainted cash of petitioner with the active participation/connivance of Sh. Rajendra N., Sh. Sunil Kumar Sharma, Sh. Sachin Narayan and others. It is also seen that the properties where the search operations were carried out either belong to petitioner or his associates and were in active control of the petitioner. The persons who have been found to be in possession of tainted cash have stated that the cash belongs to the petitioner.

23. Learned Additional Solicitor General further submitted that during the investigation it has been found that petitioner also transacted with one Sh. Ajay Khanna, designated partner of AN Build prop LLP in New Delhi. During the course of search proceedings by the Income Tax Department at the residence of Sh. Anjaneya Hanumanthaiah on 02.08.2017, it was found that the total tainted cash transaction in relation to the property bought from Ajay Khanna was Rs.4.0 Crores. The said cash was not shown or accounted.

24. It is argued by Mr. Natrajan, learned ASG that in furtherance of the

summons issued to the petitioner for recording his statement U/s 50(2) of the PMLA,2002 for 30.08.19, 31.08.19,02.09.19 and 03.09.19 he appeared in the office of the ED wherein his statement has been recorded on 30.08.19, 31.08.19, 02.09.19 and 03.09.19. However, he has not explained the illegal generation of money found during search as well as deposited in several bank accounts and has been evasive. The transactions as recorded in the incriminating documents recovered indicate that he has generated large sums of money and looking into the position he has been holding as Minister for several times in the State Government of Karnataka and using some Government Servants and he is authority for furtherance of his conspiracy for both generation of huge amount of money through misuse of his official position and business relations is not ruled out as the statement given by various persons have already emphasized that all the money they were handling belonged to the petitioner and all his family members like mother, wife, daughter have shown phenomenal growth in assets in the period when he was holding high position which has not come out of legitimate business which he is claiming. The petitioner has directly as well as indirectly been involved in the process, concealment, possession, acquisition and use of the proceeds of crime which was directly/indirectly derived as a result of

criminal activity relating to schedule offence.

25. Further submitted, it has emerged from investigation conducted so far that he abused his official position to generate illegal money as is also evident from the increase in assets of the petitioner and his family members which are not in tune with the disclosed income of the family.

26. As per the information available at this point of time, petitioner and his family members are maintaining around 317 bank accounts wherein deposits and transfers have been made, also it is evident from the details of deposits that during the period huge cash has been deposited/ transferred in the bank and the amount of transactions is varying every year disproportionately. Some part of the tainted cash was claimed as agricultural income and was directly invested in immovable properties without routing through bank accounts where other part of the tainted cash deposited/ transferred in Bank accounts of distant relatives and associate was transferred to close family relatives like mother, father, wife and daughter of petitioner.

27. It is also submitted that the statement of the petitioner was recorded 12 times by the Investigating Agency from 30-08-2019 till 12-09-2019. In all these statements, the petitioner did not mention that there was

documentary evidence for the agricultural income earned by his father, which is now being used to explain the source of investment in properties. However, in the instant bail application, the petitioner has mentioned about a certificate from the Tehsildar to justify his father's agricultural income. It prima facie appears to have been created as an after thought as there is neither any date of issuance of the certificate nor Tehsildar has recorded the basic details like landholding, crops grown etc. for certifying the agricultural income to the tune of Rs.25 lacs. This fact is under investigation by the Directorate.

28. It is submitted that the residence of Sh. Anjaneya, an Assistant Liaison Officer in Govt. of Karnataka and a close associate of the petitioner, was subjected to search u/s 17 of PMLA, 2002 and two laptops & mobile phone belonging to the petitioner were recovered from his house. He has tried to hide the evidences by placing his personal laptops in other person's custody. These laptops have been sent for forensic examination.

29. It is further submitted that the petitioner has held high offices of Minister. From his means, position and standing there is every likelihood that he would employ every means to frustrate the investigations against him. Furthermore, his mere presence at large would intimidate the witnesses.

30. It is submitted that means, position and standing of the petitioner is an extremely vital factor to be considered while granting bail to the accused. Furthermore, it is also well settled that if the accused is of such character that his mere presence at large would intimidate the witnesses or if there is material to show that he will use his liberty to subvert justice or tamper with the evidence, then bail has to be refused.

31. Heard learned counsel for the parties and perused material on record.

32. It is not in dispute that the petitioner was discharged by the Special Court, Bengaluru in 3 out of 4 complaints vide order dated 28.02.2019. however, the application seeking discharge in the 4th complaint was dismissed by the Special Court, Bengaluru, vide order dated 25.06.2019. The petitioner had challenged the said order in Revision Petition No. 955/2019 filed before the High Court of Karnataka which granted stay of further proceedings vide order dated 20.08.2019 in the said 4th complaint case pending before the Special Court, Bengaluru.

33. It is also not in dispute that the offences under Section 276C, 277 of the Income Tax Act alleged against the petitioner are compoundable offences and the only 'Scheduled Offence' invoked against the petitioner is Section 120 B IPC.

34. It is also not in dispute that Anjaneya Hanumanthaiah who challenged order of the High Court of Karnataka in WP(Crl.) No. 281/2019 wherein the Hon'ble Supreme Court issued notice and the Hon'ble Court directed the respondents that no coercive action shall be taken against the petitioners. However, I am not giving any opinion on the merit of case of the prosecution.

35. While dealing with the bail application, it is not in dispute that three factors have to be seen viz. i) flight risk, ii) tampering evidence iii) influencing witnesses.

36. Regarding the flight risk, neither argued by learned Additional Solicitor General nor placed any material on record, therefore, flight risk of the petition is ruled out.

37. Regarding tampering with the evidence, it is not in dispute that the documents relating to the present case is in the custody of the prosecuting agency, Government of India and the Court. Moreover, presently, the petitioner is not in power except he is a Member of Legislative Assembly. Therefore, in my considered view, there is no chance of the petitioner to tamper with the evidence.

38. On the issue of influencing the prosecution witnesses, the respondent

has not placed any record to establish that either the petitioner or his family members or associates ever tried to contact any of the witnesses not to disclose any information regarding money earned by him for self and family members or associates. Moreover, petitioner has been examined extensively. All the 14 witnesses have already been examined.

39. He was arrested on 3rd September, 2019 and remained 15 days in the custody of respondent and thereafter in judicial custody. He is no more required for investigation or interrogation by the prosecution.

40. Moreover, he remained 4 days in Hospital and that in ICU wherein Angiography was also performed on the petitioner.

41. In view of the discussion above, I am of the considered opinion, the petitioner is entitled for bail on merits and medical grounds as well. Accordingly, the petitioner shall be released on bail with conditions as under:-

- (i). On furnishing personal bond for an amount of Rs. 25 lacs with two sureties of the like amount to the satisfaction of the Trial Court.
- (ii). He shall not leave the country without permission of Court.
- (iii). Also shall make himself available for investigation, if required by the prosecuting agency.

(iv). He shall not influence the prosecution witnesses directly or remotely.

42. Accordingly, present bail application is allowed.

CRL.M.A. 37260/2019 and CRL.M.A. 38212/2019

43. In view of the order passed in the present bail application, these applications have been rendered infructuous and are accordingly, disposed of.

44. A copy of this judgment be given dasti to counsel for the parties, under signatures of the Court Master.

(SURESH KUMAR KAIT)
JUDGE

OCTOBER 23, 2019
Ms/p

न्यायमेव जयते