

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Reserved on: 4th July, 2019*
Decided on: 9th July, 2019

+ **BAIL APPLN. 249/2019**

UPENDRA RAI

..... Petitioner

Represented by: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Sidharth Agarwal, Mr. Arjun
Dewan, Mr. Arjun Mukherjee, Ms.
Sowjhanya Shankaran, Advs.

versus

DIRECTORATE OF ENFORCEMENT

..... Respondent

Represented by: Mr. Vinod Diwakar, CGSC, Mr. Amit
Mahajan, CGSC with Ms. Mallika
Hiremath, Adv. with Mr. Surendra
Malik, Deputy Director.

CORAM:
HON'BLE MS. JUSTICE MUKTA GUPTA

CrI.M.A. 9456/2019 (addl. documents)

Additional documents as placed on record by the petitioner being the application of the respondent before the Trial Court under Section 44 (1)(c) PMLA and the reply by the CBI are taken on record.

Application is disposed of.

BAIL APPLN. 249/2019

1. By way of the present bail application, petitioner Upendra Rai seeks regular bail in ECIR/03/HIU/2018 dated 9th May 2018 recorded by Enforcement Directorate, Delhi Zone under Sections 3/ 4 of the Prevention of Money Laundering Act, 2002 (in short 'PMLA').

2. The above-noted ECIR No.18/DLZO-II/2016 was recorded by the respondent on 9th May 2018 pursuant to RC-217-2018 A 0003 registered for offences punishable under Sections 120B/420 IPC and Section 13(2) read with Section 13 (1) (d) PC Act on 1st May 2018 and RC-217-2018 A 0004 registered for the offences punishable under Sections 120B/384 IPC and Section 8 PC Act on 5th May 2018 by the CBI.

3. Brief conspectus of facts as recorded in the ECIR against Upendra Rai, Rahul Sharma, unknown officials of Income Tax Department, Mumbai and other unknown public servants and private persons are that during the course of investigation in RC-217-2018 A 0004 under Sections 120B/384 IPC and under Section 8 PC Act it was revealed that in September 2017 Upendra Rai approached Mr. Kapil Wadhawan, a relative of the promoter of the company, M/s White Lion Real Estate Developers Private Limited (in short 'WLREDPL'), Mr. Hiten Sakhuja, portraying himself as a power broker of the Income Tax Department and various other Government Departments. He also impressed that he was a senior journalist having worked with Tehelka, Star TV and was connected to big media houses. In his conversation with Mr. Kapil Wadhawan he claimed that he had sensitive information from the Income Tax Department relating to raids to be conducted on the companies related/ associated with M/s White Lion Real Estate Developers Private Limited and that action would be claimed against them under the new Benami Act.

4. Thereafter, Kapil Wadhawan met Upendra Rai in Delhi at his residence where he was shown a big bunch of documents of the Income Tax Department wherein action was contemplated on a number of companies, including those related/associated with M/s White Lion Real Estate

Developers Private Limited. Upendra Rai demanded huge amount of money to settle the issue with the Income Tax department and adverse media reporting. He claimed that he had contacts in Income Tax department located at Scindia House, Mumbai.

5. Pursuant to this a consultancy agreement dated 3rd October 2017 was entered into between Upendra Rai & Associates and M/s White Lion Real Estate Developers Private Limited with effect from 1st October 2017 to 30th September 2018. As per the agreement a sum of ₹15,19,50,000/- was paid from the account of M/s White Lion Real Estate Developers Private Limited maintained at Axis Bank to Upendra Rai's account maintained at HDFC Bank between October 2017 and April 2018. On realizing that Upendra Rai was a professional black mailer M/s White Lion Real Estate Developers Private Limited terminated the consultancy agreement.

6. The allegations against the petitioner in RC-217-2018 A 0003 under Section 120B/420 IPC and Section 13(2) read with 13(1) PC Act with regard to the bank account transaction in the year 2017 depicting the credit entries of ₹79 crores and total debit amount of ₹78.5 crores and that he purchased a fleet of cars out of the ill-gotten money and received about ₹16 crores in one year from Shell companies for bribing/ fixing cases in income-tax department. He received ₹6.5 crores from M/s. Sahara India in one year and that the petitioner in conspiracy with Prasun Roy, Chief Security Officer of M/s. Air One Aviation Private Limited and unknown officials of Bureau of Civil Aviation (BCAS) cheated BCAS and DIAL, and fraudulently obtained a temporary and permanent Aero-drum Entry Pass (AEP), a valuable security, by deceiving on the basis of false information and getting a legal right to access of the airports in India.

7. On 6th August 2018, Directorate of Enforcement filed a complaint against Upendra Rai pursuant to investigation on the allegations in the ECIR with the material that Upendra Rai was operating/controlling a large number of bank accounts either in his own names or in the names of his family members, close associates or entities under his control. A total sum of ₹16,40,06,000/- was received by Upendra Rai through the crime reported vide RC-217-2018 A 0004 dated 5th May 2018 in his bank accounts bearing number 50200015024600, belonging to his firm M/s Upendra Rai & Associates with HDFC Bank Ltd. from the bank account bearing number 909020043463585 of M/s White Lion Real Estate Developers Private Limited with Axis Bank. The scrutiny of three accounts belonging to Upendra Rai bearing number 50200015024600 in the name of his firm M/s Upendra Rai & Associates, account number 13611930002043 in his own name and account number 13611930002043 owned jointly with Ms. Uma Rai revealed that voluminous transactions worth more than 100 crores were carried out by him within a period of three or four years.

8. Searches under Section 17(1) PMLA were carried out on different dates on 20 premises related to Upendra Rai and his associates which resulted in recoveries of details related to huge financial transactions. The search led to the recovery of a consultancy agreement dated 3rd October 2017 executed by Upendra Rai with M/s White Lion Real Estate Developers Private Limited. The scrutiny of the consultancy agreement revealed that to receive and claim the proceeds of crime as untainted money, Upendra Rai, for and on behalf of Upendra Rai & Associates had entered into a consultancy agreement with the company M/s White Lion Real Estate Developers Private Limited on 3rd October 2017. As per the agreement

Upendra Rai would be the executive of strategic goals and objectives, company policies, formulation and execution of all business strategies, business development, media affair and development of service lines relating to infra business and would preside over day to day performance etc. However, close scrutiny of the evidence collected during investigation shows that no such consultation was ever given by Upendra Rai. The scrutiny of the documents also revealed that Upendra Rai also issued a number of false/bogus invoices to M/s White Lion Real Estate Developers Private Limited under the signature of his associate Rahul Sharma. The first invoice dated 1st July 2017 does not bear the seal of the firm and is mentioned as signing bonus for advisory/consultancy for group. The investigation further revealed that Upendra Rai used the proceeds of crime to purchase properties in his name or in the name of his family members and also used it to repay the loans taken from financial organizations to acquire some other properties. He used the fund of ₹16,40,06,000/- received from M/s White Lion Real Estate Developers Private Limited to repay two home loans taken from State Bank of India, against the properties at 1st and 2nd Floor, C-24, G.K.-1, New Delhi. These properties were purchased by him as per respective sale deeds dated 28th December 2015 and 26th March 2014. The value of these properties as per sale deeds are ₹4,45,00,000/- and ₹6,00,00,000/- respectively. Both these loans were repaid by him on 3rd November 2017.

9. According to the complaint the investigation revealed that having adopted similar modus-operandi, Upendra Rai had targeted following entities i.e. M/s. Buddy Retail (P) Ltd., Rapid Engineering Company Pvt. Ltd., Chan Capital Advisory Pvt. Ltd., M/s. Premier Infra Services Pvt. Ltd.,

M/s. SAKS India and M/s. Any Time Health Care, and thus extorted a huge sum of ₹29,58,09,570/-. As per the investigation it is alleged that the petitioner through his CA and an accommodation entry operator laundered a sum of ₹5,19,80,000/- against cash, which money was used to buy a property/ flat bearing No. 801, Ashadeep, 9 Haley Road and a forged and fabricated agreement to sell was prepared in this regard.

10. On 26th October 2018 the first supplementary complaint was filed by the Enforcement Directorate implicating Narendra Kumar Rai as the 2nd accused, Rajesh Mathur as the 3rd accused and Joginder Pal Gupta as the 4th accused. The supplementary complaint notes down the transactions in relation to M/s. Air One Aviation Private Limited, a sister concern of M/s. Air One Charters Private Limited and records statement of Alok Sharma, its Director who stated that the petitioner influenced him to issue an appointment letter to engage him as a consultant, however the terms and conditions of appointment were not clear and the work to be performed was unformulated. The work purportedly assigned to petitioner was to secure funds for planned scheduled airline's activities in addition to the banking and PR activities in respect of M/s. Air One Aviation Private Limited, however he could not arrange any investment for the said group.

11. Contention of learned counsel for the respondent seeking dismissal of this bail application is that merely because bail has been granted in the two predicate offences investigated by CBI would not be the sole criteria to grant bail in the ECIR. He states that the complaint and supplementary complaint filed by the respondent is distinct from the predicate offences due to the nature of investigation under PLMA. Charge-sheet for the offence of extortion has been filed against the petitioner by the CBI. Further evidence

has come on record that the petitioner received a total amount of approximately ₹52,52,00,000/- from money laundering which was invested by entering into two sale deeds and repaying loans. The petitioner is not only involved in extorting a huge amount of ₹16,40,06,000/- but also has extorted a huge amount of ₹29,58,09,570/- from the companies like M/s. Buddy Retail (P) Ltd., Rapid Engineering Company Pvt. Ltd., Chan Capital Advisory Pvt. Ltd., M/s. Premier Infra Services Pvt. Ltd., M/s. SAKS India and M/s. Any Time Health Care. The investigation has also revealed that the petitioner has laundered a sum of ₹5,19,80,000/- through his CA Shri Sachin Aggarwal and taken an accommodation entry from Rajesh Mathur against cash.

12. From the complaint and supplementary complaint filed by the respondent laundering of a sum of approximately ₹52,55,00,000/- has been revealed and the provisional attachment of approximately ₹26 crores has been confirmed by the Adjudicating Authority. Even if the maximum punishment provided for offence defined under Section 3 and punishable under Section 4 of PMLA being sentence for imprisonment for 7 years, in view of the gravity of offence no bail be granted to the petitioner.

13. Referring to the decision of the Supreme Court reported as (2013) 7 SCC 466 Nimmagadda Prasad Vs. Central Bureau of Investigation it is contended that in view of the prima facie charge being established, nature of evidence supporting thereof, severity of the punishment which conviction entails, character of the accused and the reasonable apprehension of the witnesses being tampered with; in the larger interest of the State bail be not granted. Reliance is also placed on the decision of the Supreme Court reported as (2018) 11 SCC 46 Rohit Tandon Vs. Directorate of Enforcement.

Relying upon the decision of the Supreme Court in (2004) 7 SCC 528 Kalyan Chandra Sarkar Vs. Rajesh Ranjan @ Pappu Yadav & Anr. it is contended that when earlier bail applications have been rejected there is a further onus on the Court to consider the subsequent application for grant of bail by noticing the ground on which earlier bail applications have been rejected. Learned counsel for the respondent also relies upon the amendment in Section 45 of the PMLA as also Sections 22 to 24 of the PMLA.

14. Learned counsel for the petitioner advancing his arguments for grant of bail and rebutting respondent's contentions contends that CBI registered RC-217-2018 A 0003 under Sections 420 IPC and Section 120B read with Section 13(2) and Section 13(1) of PC Act registered by the CBI on 1st May, 2018. The CBI also registered RC-217-2018 A 0004 under Section 120B read with Section 384 IPC and Section 8 PC Act on 1st May, 2018. In RC 0003 petitioner was arrested on 3rd May, 2018 and granted bail on 8th June, 2018. On the night when he was released from the jail on 8th June, 2018 at 9.45 PM the petitioner was immediately apprehended by the officers of the respondent and a summon under Section 50 PMLA for appearance on 12:20 AM on 9th June, 2018 was handed-over. The ECIR/03/HIU/2018 wherein the petitioner is now seeking bail was only recorded on 9th May, 2018 after his apprehension on 8th May, 2018 and since then the petitioner is in custody in this case. Further on a petition filed before this Court, though the bail granted in RC 0003 was cancelled on 4th September, 2018, however a coordinate Bench of this Court granted bail in this RC on 7th January, 2019. In RC 0004 registered by the CBI, bail was granted by this Court on 11th December, 2018.

15. Learned counsel for the petitioner further contends that in RC 0003 no sanction for prosecution of any public servant was given and the only allegations against the petitioner are for offences punishable under Section 120B read with Section 420/468/471 IPC claiming that the petitioner induced authorities of Bureau of Civil Aviation and on the strength of forged documents obtained an Aerodrome Entry Pass (AEP). In response to the application of the respondent before the learned Trial Court seeking clubbing of RC 0003 of CBI along with trial in ECIR in terms of Section 44 (1)(c) of the PMLA before the Special Court, the CBI has filed a reply clearly stating that in RC 0003 charge-sheet does not involve any wrongful pecuniary gain to the accused persons in terms of the money. Therefore, the proceeds of the crime in monetary terms do not exist in the said charge-sheet and as such the question of laundering the same does not arise. Hence, CBI has objected to the clubbing of its charge-sheet in RC 0003 as one of the predicate offences on which this ECIR was recorded for being tried together.

16. It is further contended that even in the complaint filed the claim of the respondent that there is laundering of money to the extent of approximately ₹52,55,00,000/- is incorrect as till date no complaint has been received by any other entity except M/s. White Lion Real Estate Developers Private Limited. In the absence of any complaint from M/s. Buddy Retail (P) Ltd., Rapid Engineering Company Pvt. Ltd., Chan Capital Advisory Pvt. Ltd., M/s. Premier Infra Services Pvt. Ltd., M/s. SAKS India and M/s. Any Time Health Care; the respondent cannot treat the income of the petitioner reflected in its bank account as that of money laundering and is beyond the scope of investigation or trial by the respondent. The petitioner has duly paid taxes on all the incomes reflected in his account and in any case it

would be for the income-tax authorities to go into the same if required and not for the Enforcement Directorate.

17. The decision relied upon by the respondent in the case of Gautam Kundu (supra) has no application to the facts of the case as the said decision was rendered prior to the Supreme Court passed the judgment reported as (2018) 11 SCC 1 Nikesh Tarachand Shah Vs. Union of India & Anr. declaring Section 45 (1) of the PMLA in so far as it imposes two further conditions for release on bail to be unconstitutional as it violates Article 14 and 21 of the Constitution of India. Reliance of the learned counsel for the respondent on the decision in Kalyan Chandra Sarkar (supra) is also misconceived as the said decision was rendered under Section 437 (1) Cr.P.C. wherein the offence punishable is with death or imprisonment for life. In the present ECIR the maximum punishment which can be awarded after trial to the petitioner would be imprisonment for a period of 7 years out of which more than 1 year has already elapsed for the petitioner being in custody and no charge could be framed for the purported reason that the respondent claims that their investigation is in progress. Contention of learned counsel for the respondent that with the amendment in Section 45 of PMLA in the year 2018 wherein the words “under this Act” have been used have been dealt by two different High Courts i.e. Bombay High Court and Madhya Pradesh High Court, which clearly note that the amendment does not revive or resurrect the original Section 45(1)(ii). Section 24 of the PMLA has no application to the facts of the present case for the reason no charge has been framed on the petitioner and thus Section 24 does not come into play. Despite the respondent expressing his apprehension of tampering with the evidence or witnesses, there is no material placed on record to show

that the petitioner has ever tampered the evidence. In the two predicate offences where the punishment prescribed is more than the present ECIR, the petitioner has already been released on bail, hence he be released on bail.

18. Before proceeding on the facts of the case it would be appropriate to deal with the amendment under Section 45 of PMLA. Section 45 of PMLA with the amendment of 2018 reads as under:

“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 offence⁷⁷ under this Act shall be released on bail or on his own bond unless—

- (i) the Public Prosecutor has been given a 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:*

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by—

- (i) the Director; or*
- (ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.*

(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of

this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.”

19. By virtue of the amendment in the year 2018 the words “under this Act” have been inserted in sub-Section 1 of Section 45, as noted above. In Nikesh Tarachand Shah (supra) while dealing with the constitutional validity of the twin condition imposed under Section 45(1), the Supreme Court held:

“54. Regard being had to the above, we declare Section 45(1) of the Prevention of Money-Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective courts which denied bail. All such orders are set aside, and the cases remanded to the respective courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that the persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective courts for fresh decision. The writ petitions and the appeals are disposed of accordingly.”

20. A bare perusal of the amended Section 45 would reveal that the introduction of the words “under this Act” would not revive the twin conditions as imposed in Section 45(1) PMLA which view has also been expressed by two other High Courts. In Bail Application No. 286/2018

Sameer M. Bhujbal Vs. Assistant Director, Directorate of Enforcement & Anr., the Bombay High Court held:

“9. It is to be noted here that, after effecting amendment to Section 45(1) of the PMLA Act the words “under this Act” are added to Sub Section (1) of Section 45 of the PMLA Act. However, the original Section 45(1)(ii) has not been revived or resurrected by the said Amending Act. The learned counsel appearing for the applicant and the learned Additional Solicitor General of India are not disputing about the said fact situation and in fact have conceded to the same. It is further to be noted here that, even Notification dated 29.3.2018 thereby amending Section 45(1) of the PMLA Act which came into effect from 19.4.2018, is silent about its retrospective applicability. In view thereof, the contention advanced by the learned A.S.G. cannot be accepted. It is to be further noted here that, the original Sub-section 45(1)(ii) has therefore neither revived nor resurrected by the Amending Act and therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act.”

21. Similar view was expressed by the Madhya Pradesh High Court in M.Cr.C. No. 34201/2018 titled as Vinod Bhandari Vs. Assistant Director, Directorate of Enforcement decided on 29th August, 2018. This Court finds no reason to disagree with the two views expressed.

22. Learned counsel for the respondent also relied upon Section 24 of the PMLA. Section 24 of the PMLA read as under:

“24. Burden of proof.-

In any proceeding relating to proceeds of crime under this Act,—

- (a) in the case of a person charged with the offence of money-laundering under section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are involved in money-laundering; and*
- (b) in the case of any other person the Authority or Court,*

may presume that such proceeds of crime are involved in money-laundering.”

23. A bare perusal of Section 24 reveals that in the case of a person charged with the offence of money laundering, the authority or the Court shall presume that such proceeds of crime are involved in money laundering unless the contrary is proved. The stage of raising the presumption or for the accused to rebut the said presumption would be during the course of trial. Even if assuming that at the stage of bail this Court is required to consider that the accused is prima facie required to rebut the presumption, the same would not have to be beyond reasonable doubt but on the basis of broad probabilities.

24. As noted above, a reply has already been filed by the CBI in relation to one of the predicate offences being RC 0003 on which the present ECIR has been recorded that no sanction has been granted against any of the public servant and the charge-sheet has been filed as the accused person induced Bureau of Civil Aviation Authorities on the strength of forged documents to obtain Aerodrome Entry Pass (AEP) in the petitioner's favour. It is clarified that the charge-sheet does not involve any wrongful pecuniary gain to the accused persons in terms of money and as such the question of laundering the same does not arise.

25. In respect of RC 0004 which is registered on the complaint of Kapil Wadhawan claiming that the petitioner approached them portraying himself as the power-broker of the income-tax department and various other Government departments and entered into a consultancy agreement whereby a sum of ₹16,40,06,000/- was transferred from the accounts of M/s. White Lion Real Estate Developers Private Limited to the accounts of the

petitioner as against which a sum of ₹26,65,45,476/- from the accounts of the petitioner stands attached by the respondent. Further admittedly till date there is no complaint whatsoever by M/s. Buddy Retail (P) Ltd., Rapid Engineering Company Pvt. Ltd., Chan Capital Advisory Pvt. Ltd., M/s. Premier Infra Services Pvt. Ltd., M/s. SAKS India and M/s. Any Time Health Care in regard to any scheduled offence provided under the PMLA, despite the ECIR having been recorded on 9th June, 2018 and the complaint by the respondent having been filed on 6th August, 2018 and supplementary complaint having been filed on 26th October, 2018. Moreover, though the claim of the respondent was that it has material beyond the predicate offences and despite learned counsel for the respondent having sought adjournment on that count, no such material has been placed or shown from the case diaries.

26. Reliance of learned counsel for the respondent on the decision in Kalyan Chandra Sarkar (supra) is untenable for the reason this is the first bail application of the petitioner before this Court and no other application for bail in the present ECIR has been either filed or rejected by this Court.

27. Indubitably, this Court while granting bail has to take into consideration prima facie material available to fortify the commission of the offence, gravity of the offence, severity of the punishment, chances of the petitioner not being available for trial or tampering with the evidence or the witnesses. As noted above, in regard to the prima facie satisfaction of the Court in support of the charge in the two predicate offences on the basis of which ECIR stands recorded, the CBI has already clarified that in RC 0003 no pecuniary advantage has been received by the accused and thus there is no question of laundering the proceeds of the crime. In RC 0004 the

complaint is by Kapil Wadhawan on behalf of M/s. White Lion Real Estate Developers Private Limited and it is alleged that a sum of ₹16,40,06,000/- has been extorted. There is no complaint from any of the entities noted in Para 25 above. Even otherwise as per the respondent, the total amount stated to have been laundered is approximately ₹52,55,00,000/- out of which ₹26,65,45,476/- stands attached. The maximum punishment provided for the offence punishable under Section 4 PMLA being 7 years imprisonment and the petitioner having undergone more than 1 year 1 month of custody and the trial likely to take some time, there being no material placed on record to show that the petitioner has been tampering of evidence and the statement of Alok Sharma which has been pressed in by the respondent stating that the petitioner forced him to remain associated with him, this Court finds it to be a fit case for grant of bail to the petitioner.

28. Consequently, the petitioner is directed to be released on bail on his furnishing a personal bond in the sum of ₹1 lakh with one surety bond of the like amount to the satisfaction of the learned Trial Court, further subject to the condition that the petitioner shall not leave the country without the prior permission of the Court concerned and in case of change of residential address the same will be intimated to the Court concerned by way of an affidavit and will not influence any witness or tamper with the evidence of the prosecution.

29. Petition is disposed of.

30. Order dasti.

(MUKTA GUPTA)
JUDGE

July 09, 2019
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