**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CRM-M-31053-2021
Date of Decision: 08.10.2021**

Mukesh Kumar Sharma

......Petitioner

Vs.

State of Punjab and another

.........Respondents

CORAM: HON'BLE MR. JUSTICE AMOL RATTAN SINGH

Present: Mr. Vikram Chaudhri, Senior Advocate, with
Mr. Keshavam Chaudhri, Advocate,
for the petitioner.

Mr. V.G. Jauhar, Sr.D.A.G., Punjab.

Mr. S.V. Raju, Addl. Solicitor General of India with
Mr. Zoheb Hussain, Special counsel for ED and
Mr. Vishal Gupta, Advocate, for respondent no.2.

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AMOL RATTAN SINGH, J.

Case heard via video conferencing.

By this petition, the petitioner seeks the concession of 'pre-arrest bail' upon FIR no. 161 having been registered at Police Station City Phagwara, District, Kapurthala, on 17.06.2021, alleging therein the commission of offences punishable under the provisions of Sections 467/471/120B/108A of the IPC.

2. The background of the matter is that on a complaint made by respondent no. 2, i.e. the Assistant Director, Directorate of Enforcement, Government of India (hereinafter referred to as the Directorate), to the Senior Superintendent of Police, Kapurthala, on 13.04.2021, FIR No. 161 was registered on 17.06.2021 at Police Station City Phagwara, alleging therein

the commission offences punishable under the provisions of Sections 467/471/120-B/108-A of the IPC.

3. As per the FIR, in the year 2014, the Government of Netherlands is stated to have unearthed "underground banking and laundering of direct or indirect proceeds of crime in respect of Sh. Shivlal Pabbi (a Dutch national)."

Thus, Shivlal Pabbi was suspected of violating Section 420 of the Dutch Penal Code which, as per the complainant, corresponds to Section 3 of the Prevention of Money Laundering Act, 2002, (herein after referred to as the Act). He was alleged to have also 'violated' Section 225 of the Dutch Penal Code which is stated to be corresponding to Section 467 of the IPC and further, with Section 326 of the Dutch Penal Code also having been violated by Pabbi, corresponding to the Sections 415 and 420 of the Indian Penal Code; and therefore, upon a '*note verbale*' received from the Embassy of Netherlands, New Delhi, the Directorate of Enforcement had initiated investigation against the aforesaid Pabbi.

4. A letter of request was also received by the Directorate from the Ministry of Home Affairs, Government of India, alleging as under:-

a) That Shivlal Pabbi led a criminal organization that facilitated the process of drug related crime and transfer of proceeds of crime through money couriers (indicating transfer of money through '*hawala*' channels);

b) That the proceeds of "underground banking" carried out by Shivlal Pabbi were transferred, via others, to Dubai and India, Pabbi having invested hugely in India, including in Cabbana Resorts, Ludhiana, and in real estate in Samanpur, etc;

c) That Sh. Anil Chodha and Manoj Chodha had been appointed as shareholders in Cabbana Hotel but in reality had no powers and had received no profit distribution; and

d) That Shivlal Pabbi worked as a Manager for M/s SM Fashions B.V., registered in the name of Sh. Mukesh Sharma (the petitioner) and that "Sh. Mukesh Sharma gave a loan of Euro 2,00,000 to Sh. Pabbi and invested Euro 7,34,813.02 of his private means in M/s SM Fashion B.V., despite the fact that Sh. Mukesh did not have access to such huge amount of money on his own e.g. Sh. Mukesh Sharma was asking for money from Sh. Pabbi for his sons' marriage (surveillance by Dutch authority). The payment and repayment of the loan could not be found in Pabbis' account."

(Emphasis applied in this order only).

5. The FIR further states that during the course of investigation into the offences punishable under the provisions of the Act, searches were conducted at the premises of M/s Cabana Infrastructure Pvt. Ltd., as also on the premises the aforesaid Anil Chodha and Manoj Chodha and the petitioner herein, on 17.02.2021, under the provisions of Section 17 of the Act.

6. Statements of the petitioner herein, of Pabbi, and others, were also recorded under the provisions of Section 50 of the Act, with the Directorate having found at that stage that Pabbi, with an intention to save taxes in the Netherlands and to cheat the Dutch Authorities, incorporated a firm by the name of 'S.M. Fashions BV' in the Netherlands, 'in the name' of his childhood friend (petitioner Mukesh Sharma), who is a resident of

Phagwara (District Kapurthala, India).

Thus, it is further stated in the FIR that the petitioner was found to be the owner of S.M. Fashions BV only on paper and the firm was actually managed and controlled by Pabbi and further, that the petitioner had signed an instrument conferring a power of attorney on Shivlal Pabbi on 09.05.2005, so that business operations of the company could be run by Pabbi in the Netherlands.

7. Importantly, the FIR next states that Pabbi indulged in transfer of money on behalf of other persons, i.e. in '*Hawala'* operations or "underground banking" activity and earned a commission in the form of cash to hoodwink the authorities in the Netherelands; and to evade taxes there he created a facade of a legitimate business operation in the name of S.M.Fashion BV (which in turn was "in the name" of the petitioner, Mukesh Sharma", with the earlier part of the FIR stating that it is registered in the petiitiones' name).

It is next stated that Shivlal Pabbi also used the cover of business operations in the said S.M.Fashion BV to conduct "underground banking".

8. The petitioner is stated to have executed and signed the aforesaid power of attorney, dated 09.05.2005, as the sole shareholder of the said company, with powers delegated to Pabbi to run the company in the Netherlands, even though the petitioner did not invest any money in the company himself but authorized Pabbi to handle all financial transactions including the banking transactions with the power to employ staff, rent and lease offices etc. for the company.

9. The petitioner is also alleged to have signed and executed a loan agreement providing a loan of Euro 2,00,000 to Shivlal Pabbi; even though no loan was actually extended by him to Pabbi and further, the petitioner also signed (on behalf of S.M.Fashion DV), a 'Deed of Sale of Assets and Liabilities' with Shivlal Pabbi and by virtue of that deed, purchased all the assets and liabilities of Pabbis' business concern, named Euro Mode.

However, in reality there was found to be no money involved in the transactions shown in the books, on behalf of the petitioner, and the transactions shown against payments to creditors and the loan to Pabbi from the petitioner, was only a sham transaction for the purpose of book keeping.

Thus, *'Hawala'*/"underground banking" operations in the Netherlands are alleged to have been run by Pabbi under the cover of business operations of S.M. Fashions BV, with the commission earned through this illegitimate '*Hawala'* business, in cash, then transferred by Pabbi to his bank account in the State Bank of India, Phagwara, through Dubai.

However, the proceeds of the '*Hawala'/"*underground banking" operations were not declared to the Netherlands authorities and were being laundered to India through Dubai and were invested in Cabanna Resorts situated at National Highway-I (at the Jalandhar-Ludhiana stretch of the Highway).

10. Hence, as per the Directorate, it was evident that the cash generated as commission out of the "underground banking"/*'Hawala'* business of Pabbi was disguised under the cover of legitimate business operations of S.M.Fashion B.V. (at least legally owned by the petitioner and not by Pabbi), though it was actually run by Pabbi on the strength of a

Power of Attorney that was deliberately created for that purpose.

Hence, the said instrument (POA) is stated to have formed the basis on which tax evasion was done by Pabbi in the Netherlands, with offences related to forgery, cheating, money laundering and banking without permit also committed by him in that country.

Very importantly, the petitioner is alleged to have assisted Pabbi in the commission of such offences, by allowing him to not only prepare false documents, but by also signing and executing a fraudulent loan agreement, a sale deed and the said power of attorney, with the petitioner therefore being an active participant in the criminal conspiracy hatched by Pabbi and others to evade taxes and cheat the Government of Netherlands, as also to launder proceeds of a crime committed in the Netherlands, to India, with the investments made in Cabana Infrastructure Private Limited and Mayfair Resorts Jalandhar, India.

11. Mr. Chaudhri, learned senior counsel appearing for the petitioner, has submitted to this court a compilation of judgments, as also a 'synoptic note' to which he has today referred to extensively.

12. As per learned senior counsel for the petitioner, the following allegations are made against the petitioner in the FIR:-

(i)Power of attorney dated 09.05.2005;

(ii)Loan agreement and

(iii)Deed of sale of assets and liabilities dated 31.12.2007, which were used by Shivlal Pabbi to commit the aforesaid offences in the Netherlands. By doing so, Sh. Mukesh Sharma has abetted (under Section 108-A of the IPC) Shivlal Pabbi in the commission of the said offences.

Hence, he submits that, as per the complaint leading to registration of the FIR, offences punishable under the provisions of Section 108-A, 191, 192 and 193 of the IPC had been committed by the petitioner; and that Pabbi with the assistance of the petitioner had also committed various offences under the provisions of the Dutch Penal Code, which correspond to Section 3 of the Act and Sections 120-B, 467 and 471 of the IPC.

13. It is to be noticed by this court, at this stage itself, that though towards the end of the FIR, Section 420 of the IPC has not been mentioned (with it also not having been referred to as an offence committed in the heading of the FIR), yet, as would also be seen from the reply filed on behalf of the respondent-State, and even as per a reading of the intermittent part of the FIR, offences punishable under the provisions of Sections 415 and 420 of the IPC (cheating) are also stated to have been committed, which *prime facie* at least, would also seem to be so by this court, once it is stated time and again in the FIR, as also in the reply filed on behalf of the respondent-State, that '*Hawala*'/"underground banking" transactions are stated to have been transacted.

14. Mr. Chaudhri has essentially raised the following arguments:-

(i) That the three documents as are essentially referred to in the FIR, i.e. the power of attorney dated 09.05.2005, the loan agreement signed with Shivlal Pabbi for extending a loan for an amount of Euro 2,00,000 to Pabbi, and the deed of sale of assets and liability dated 31.12.2007 (allegedly used by Pabbi to commit offences in the Netherlands), are all genuine documents and consequently, no offence of forgery, as would be punishable under the provisions of Sections 467 and 471 of the IPC, would be made out; and therefore those being the only offences alleged to have been committed in India as per the FIR, the question of any criminal conspiracy qua such offences (in terms of Section 120-B of the IPC), would not arise;

(ii)That the matter already having been adjudicated upon in the Netherlands, with Pabbi having been convicted, but with the petitioner only summoned there as a witness, with no criminality attributed to him even as regards transfer of any money between India to Netherlands, and therefore no '*Hawala'* transaction has actually been made out by him, so as to allege the commission of an offence punishable under the provisions of Section 420 of the IPC, and that is why the said offence has never been added in the FIR;

In that context, learned senior counsel also referred to the following extracts from the FIR, as he has reproduced in his 'synoptic note':-

"........Sh. Mukesh Sharma, executed and signed the said power of attorney dated 09.05.2005 in India as the sole shareholder of S.M. Fashion BV and delegated the power to Shivlal Pabbi to run S.M. Fashion BV in the Netherlands even though Sh. Mukesh Sharma did not invest a single rupee in

the company."

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"Sh. Mukesh Sharma also signed and, executed a loan agreement (copy enclosed) for providing a loan of Euro 2,00,000 to Shivlal Pabbi even though no loan was actually extended by him to Shivlal Pabbi."

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"In reality, there was no money involved in the transactions shown in the books on behalf of Sh. Mukesh Sharma and the transactions shown against payments to creditors and loan to Shivlal Pabbi from Mukesh Sharma was only a sham done for the purpose of book keeping."

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[In fact it needs to be noticed by this court here itself, that the above reproduction in the 'synoptic note' submitted by learned senior counsel for the petitioner, is a very 'convenient' culling out of parts of the FIR, with, very conveniently, no reference having been made to those parts of the FIR where allegations of '*Hawala'*/"underground banking" transactions have been made].

(iii)That as per the prosecution, Section 225 of the Dutch Penal Code corresponds to Section 467 of the IPC with Section 327 of the Dutch Penal Code corresponding to Sections 415 and 420 of the IPC and though the petitioner denies any such parity between the said provisions of the two

Codes, even if that contention of the prosecution is to be accepted for the sake of argument, then the trial qua Pabbi is already over in the Netherlands (though with his appeal pending), with no proceedings in India therefore maintainable under the provisions of the IPC, the only alleged offence in India being under the provisions of the Act (as contended by learned senior counsel)

Mr. Chaudhri further submits that in fact Section 225 of the Dutch Penal Code is not equivalent to any provision in the IPC as regards the commission of any offence pertaining to forgery and consequently, the FIR itself is non-est;

(iv)That the respondent Directorate has lodged a separate complaint under the provisions of the Act against the petitioner as also Pabbi at Mohali; and the competent court has taken cognizance of the said offence already and consequently, an FIR based on a similar complaint of the Enforcement Directorate, on the basis of which the FIR has been registered, should not warrant custodial interrogation of the petitioner; and

(v) That the alleged transactions are at least 15 years old and are based on all documentary evidence that is already available, and consequently, there would be no reason for the custodial interrogation of the petitioner; who is 63 years old.

15. Learned senior counsel appearing for the petitioner has also relied upon various judgments but with him specifically referring to the

following to submit that once the documents as are relied upon are found to be genuine, the question of any forgery having been committed would not arise:-

1. **Mohammad Ibrahim and others** vs. **State of Bihar and another** (2009) 8 SCC 751;
2. **Inder Mohan Goswami and another** vs. **State of Uttaranchal and others** (2007) 12 SCC 1;
3. **Monica Bedi** vs. **State of Andhra Pradesh** (2011) 1 SCC 284;
4. **Siddharam Satlingappa Mhetre** vs. **State of Maharashtra** (2011) 1 SCC 694 and
5. **Mir Nagvi Askari** vs. **Central Bureau of Investigation** (2009) 15 SCC 643.

16. *Per contra*, Mr. S.V. Raju, learned Additional Solicitor General of India, has submitted that there being specific allegations in the FIR itself as regards *'Hawala'* transactions having taken place/"underground banking" transactions, it is not open for the petitioner at all to say that no *'Hawala'* transaction actually took place.

He next submits that though a complaint under the provisions of the Act is undoubtedly pending before the competent court at Mohali, yet, that does not absolve the petitioner of his liability/guilt as regards the commission of offences punishable under the provisions of the Indian Penal Code, with in fact, obviously therefore, an offence punishable under the provisions of Section 420 of the IPC also made out (in view of the allegation of *'Hawala'* transactions/"underground banking)."

17. Though as regards whether the petitioners' custodial interrogation is required or not, the learned ASG has fairly submitted that that would be something completely in the domain of the District Police, Kapurthala, where the FIR stands registered, yet he referred to what is contained in the FIR, (as has also been specifically pointed out very vociferously by Mr. V.G. Jauhar, learned Sr.D.A.G., Punjab).

18. The learned Additional Solicitor General also relied upon the following judgments to submit that the petitioner, especially in the context of a petition filed under the provisions of Section 438 of the Cr.P.C., cannot seek the extra-ordinary relief of 'pre-arrest bail' with more than a *prime facie* case made out against him even as regards *'Hawala'* transactions (as contended):-

(i)**State of Bihar** vs. **Murad Ali Khan and others** (1988) 4 SCC 655;

(ii)Monica Bedi vs. **State of Andhra Pradesh** (2011) 1 SCC 284 and

(iii)Abdul Salam vs. **State of Karela** 2002 OnLine Ker 546

19. Having considered the matter, first of course it is to be observed by this court that it is not understood at all as to how learned senior counsel for the petitioner can submit that there is not even an allegation of any '*Hawala'* transaction having taken place qua the petitioner, because, as already noticed, in the FIR itself, it has been stated at least thrice that illegitimate '*Hawala'*/ “underground banking” operations were run by Shivlal Pabbi in the Netherlands, under the cover of business operations of S.M. Fashion BV (with the allegation against the petitioner being that the said

operation is being run in his name even though he has executed a power of attorney in favour of Pabbi, with the said firm/company said to be 'registered in his name and he being the sole subscriber/shareholder thereof).

It is also to be specifically noticed that with the FIR having been registered in June 2021, on the basis of a complaint made by the respondent Directorate in April 2021, in the reply filed by the DSP, Sub-Division Phagwara, on behalf of the respondent-State, on 02.09.2021 (with obviously some investigation having taken place in the 2½ months in between), it has been stated as follows as regards the alleged *'Hawala'* transactions:-

> *"......Shiv Lal Pabbi indulged in the transfer of money on behalf of other persons, i.e. in 'Hawala' operations or underground banking activity and earned commission in the form of cash. To hoodwink the Netherlands Authority and to evade taxes in the Netherlands, he created a facade of legitimate business operations in the name of S.M. Fashions BV which was deliberately and fraudulently created in the name of an Indian national Mukesh Sharma, i.e. petitioner."*

It has next been stated in the affidavit as follows:-

> *"That it was further stated in complaint that petitioner also signed and executed a loan agreement for providing a loan of Euro 2,00,000 to Shiv Lal Pabbi even though no loan was actually extended by him to Shiv Lal Pabbi. Further, on behalf of S.M. Fashion BV, Sh. Mukesh Sharma also signed and executed a Deed of Sale of Assets and Liabilities dated 31.12.2007 with Shiv Lal Pabbi and by virtue of this*

deed, purchased all the assets and liabilities of Shivlal Pabbis' business concern named Euro Modi. In reality, there was no money involved in the transactions shown in books on behalf of petitioner and the transactions shown against payments to creditors and loan to Shiv Lal Pabbi from Mukesh Sharma was only sham done for the purpose of book keeping....."

Other than that, the FIR itself also alleges that "the payment and repayment of the loan could not be found in Pabbis' account", as regards the loan of Euro 200,000 shown to have been extended to Pabbi.

20. In view of the above, in fact this court finds it rather surprising that no offence pertaining to the provisions of Sections 420 specifically, of the IPC, has been even alleged to have been committed in the FIR, even though '*Hawala'* transactions/"underground banking" are alleged to have been transacted as per the FIR itself, which *prime facie* (at least for the purpose of this petition seeking the extra-ordinary relief of pre-arrest bail), would seem to amount to cheating.

21. Hence, in good conscience, I find it, in the face of the allegations made in the FIR and the contents of the affidavit filed on behalf of the respondent-State, impossible to accept that no offence of cheating is even alleged to have been committed.

Whether or not any such '*Hawala*' transactions amounting to cheating eventually are proved, naturally would be a matter of evidence gathered and eventually submitted to the trial court if it comes to that stage; yet, to repeat, as regards this petition filed under the provisions of Section 438 of the Cr.P.C., I find no ground to admit the petitioner to 'anticipatory

<u>bail'</u> with the aforesaid allegations made in the FIR itself, as also in the reply filed on behalf of the respondent-State.

22. As regards the contention of Mr. Chaudhri that the FIR itself is not maintainable, it is to be noticed that no petition seeking quashing of the FIR on any ground has been even referred to, as may have been filed; and consequently, *prima facie* at least finding that serious <u>allegations</u> of “underground banking” transactions/*'Hawala'* transactions have been made against the petitioner and his co-accused Shivlal Pabbi, his contention, for the purpose of this petition, is rejected.

23. The contention that since the petitioner was only summoned as a witness in the criminal proceedings against Pabbi in the Netherlands, with only Pabbi having been convicted in that country (stated to be on statutory bail upon his appeal having been admitted for consideration), and therefore no proceedings lie against the petitioner in India, is also rejected. Simply because the petitioner may not have been found, even *prime facie,* of having committed any offence in the Netherlands under Dutch Law, would be no ground for him to be admitted to bail as regards the FIR in question, wherein it is specifically alleged (as is in the reply filed on behalf of the respondent-State), that '*Hawala'* transactions between India and the Netherlands have been transacted, and therefore, offences punishable under the provisions of the Indian Penal Code would also, in my opinion at least for the purpose of this petition, be found to have been committed, and consequently, no ground whatsoever is made out to admit the petitioner to anticipatory bail.

24. Next, as regards the contention of learned senior counsel that with a complaint already having been submitted by the Directorate, as

regards their being offences punishable under the Act and therefore the FIR itself is not maintainable and therefore the petitioner has a right to be admitted to anticipatory bail, in the opinion of this court, the Directorate having only limited jurisdiction qua the said Act itself, was correct in sending the complaint as regards the commission of offences punishable under the IPC to the competent police authority (in District Kapurthala, Punjab), and with that authority also having found that offences punishable under the provisions of the IPC are made out (with this court for the purpose of this petition already having observed that possibly even an offence punishable under the provisions of Section 420 of the IPC is made out), that contention on behalf of the petitioner is rejected, in view of the detailed reasons given hereinabove, pertaining to alleged *'Hawala'* transactions/ “underground banking” transactions having taken place.

25. Last, as regards the contention that the petitioner being 63 years old and all evidence already being available by way of documentary any evidence, with the transactions themselves stated to be above 15 years old (as contended by learned senior counsel); firstly, it is to be noticed that none of the offences that the petitioner is alleged to have committed, (punishable under the provisions of Sections 467 and 471 of the IPC, or the one which is not specifically mentioned in the FIR but would *prime facie* seem be made out, i.e. under Section 420 of the IPC), is an offence that is punishable for a maximum sentence of less than 03 years, and hence, very obviously there would be no bar by way of limitation in terms of Sections 468 and 469 of the Cr.P.C., for any competent court to take cognizance of such an offence, if the proceedings in the FIR reach such a stage.

As regards all evidence being available by way of documents in the form of a power of attorney, the deed of assets and liabilities, and the loan transactions, though this court was swayed by that contention at first blush yet, with the learned Senior Deputy Advocate General, Punjab, having pointed out that *'Hawala'*/"underground banking" transactions have been time and again alleged to have been committed by Shivlal Pabbi in collusion with the petitioner, and the '*modus operandi'* of such transactions needs to be disclosed by the petitioner, which may only be possible by way of custodial interrogation and not under the protection of even an interim bail in his favour, I agree with the said contention of Mr. Jauhar, learned Sr. D.A.G., Punjab, with that also having been reiterated by the learned Additional Solicitor General.

Consequently, finding no merit in this petition, it is dismissed.

26. However, nothing stated in this order or in the previous orders passed in this petition shall be taken to be an observation of this court on the merits of the case as regards the ongoing investigation, with the observations only being in the context of a petition filed under the provisions of Section 438 of the Cr.P.C., and the arguments raised in the context of the petition; and therefore the proceedings against the petitioner and his co-accused would continue wholly on the basis of evidence gathered in the investigation, and led before the trial court, in any trial that may ensue.

Naturally, the petitioner would always be at liberty to take all legal pleas, including those as have been raised before this court in this petition, at the appropriate stage before the investigating officer, and the trial court if it comes to that stage.

The affidavit of the Deputy Superintendent of Police, Sub-Division Phagwara, dated 02.09.2021, is ordered to be taken on record, if not already so taken earlier.

October 08, 2021 **(AMOL RATTAN SINGH)**
nitin **JUDGE**

Whether speaking/reasoned Yes
Whether Reportable Yes