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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 22nd July, 2021

Decided on : 30th July, 2021

+ **BAIL APPLN. 112/2021 and CRL.M.(BAIL) 81/2021;**

+ **BAIL APPLN. 122/2021**

BIMAL KUMAR JAIN and NARESH JAIN Petitioner/s

Through : Mr.Vikram Chaudhri, Sr. Advocate with
Mr.Naveen Malhotra, and Mr.Harshit
Sethi, Advocates.

versus

DIRECTORATE OF ENFORCEMENT Respondent

Through : Mr.S.V.Raju, ASG, Mr.Zoheb Hossain,
Special Counsel, Mr.Amit Mahajan,
CGSC, Ms.Aarushi Singh, Ms.Mallika
Hiremath, Mr.Vivek Gurnani, and
Mr.Agni Sen, Advocates

CORAM:

HON'BLE MR. JUSTICE YOGESH KHANNA

YOGESH KHANNA, J. *(Through Video Conferencing)*

1. These petitions are for grant of bail to the applicant Bimal Jain (Bail Application No.112/2021) and Naresh Jain (Bail Application No.122/2021).

2. On 01.07.2017, an enquiry under FEMA, 2019 was commenced by the respondent and searches were carried out at various places against accused Naresh Jain and others. It is alleged petitioners and others had appeared on numerous occasions before the Enforcement Directorate and the enquiry was conducted for two years under Section 47 of the FEMA.

3. On 13.09.2018, the Enforcement Directorate got registered FIR No.179/2018 with the EOW Cell for Scheduled Offences under the Prevention of the Money Laundering Act, 2002 (hereinafter referred as PMLA) i.e. Sections 419/420/467/468/471/476/120B IPC.. Thereafter, instant ECIR No.05/HIU/2018 was recorded by the Enforcement Directorate and petitioners appeared before the Enforcement Directorate from November 2018 on several occasions. It is alleged the petitioner Naresh Jain appeared at least 25 times, however, on 01.09.2020 he was arrested under Section 19 PMLA. Searches were conducted by the Enforcement Directorate on 23.10.2020 under PMLA at the residential premises of the petitioner Bimal Jain also.

4. On 28.10.2020, the prosecution complaint was filed before the learned Special Judge, PMLA against eight accused persons, including the petitioners herein. Petitioner Bimal Kumar Jain also joined the investigation of FEMA as also PMLA on various occasions. However, on 02.11.2020, an application was filed by the Assistant Director of Enforcement Directorate claiming *inter alia* Bimal Jain had not deliberately received the summons and prayer was made for issuance of NBWs. Such NBWs were issued on 02.11.2020. In the meanwhile, one of the co-accused Puneet Jain approached this Court by way of CRL.M.C. 2283/2020 and NBWs were set aside against Puneet Jain by this Court. On the basis of the order dated 23.11.2020 of this Court, on 27.11.2020 in Crl.M.C.No.2283/2020 Bimal Jain moved an application for cancellation of NBWs, but during the pendency of this application, Bimal Jain was arrested on 30.11.2020, so he remained in judicial custody.

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5. Petitioner Bimal Jain then moved an application for bail but it was rejected on the ground he did not co-operate with the Investigating Officer; furnished fake addresses; and also on gravity of the offence.

6. The arguments of the learned senior counsel for the petitioner is three folds *a)* while arresting Bimal Jain, procedure under Section 19 PMLA was not followed; *b)* the Enforcement Directorate cannot be the complainant and the Investigating Officer at the same time; and *c)* effect of declaration of twin conditions under Section 45 of the PMLA have been declared unconstitutional and ultra virus in view of decision in *Nikesh Tarachand Shah vs. Union of India and Anr.* (2018) 11 SCC 1.

7. It is argued by the learned senior counsel for the petitioner Bimal Jain, per Section 19(1) PMLA the Investigating Officer must have the material in his possession; and he has reasons to believe (the reasons for such belief to be recorded in writing); that such person is guilty of offence under the Act; and after arrest of such person under sub section (1), he has to forward the copy of order along with material in his possession to the adjudicating authority in a sealed envelope. The rules qua form and the manner of forwarding the copy of the arrest order of the person along with material to the adjudicating authority were also quoted viz Rule 2, 3, 6, Form III under Rule 6 of the PMLA.

8. It was argued it is obligatory to see if there was sufficient compliance of the provisions of Section 19 of the PMLA and the Rules made thereunder. It was argued the arrest of Bimal Jain was made without compliance of Section 19 of the PMLA and Rules, hence his custody is wholly illegal and he needs to be granted bail.

9. The arguments of the learned senior counsel for the petitioner are being dealt with in seriatim.

10. Qua objection of non-compliance under Section 19 of the PMLA, I may say since the arrest of accused Bimal Jain was in execution of the NBWs therefore, the provision under Section 19 of the PMLA could not be adhered to. Admittedly, Bimal Jain was arrested in execution of the NBW by the learned Special Judge, PMLA while taking cognizance of prosecution complaint filed by the Enforcement Directorate and thus there was no occasion to comply with the requirement of Section 19 of the PMLA. The very fact the complaint was filed by the Enforcement Directorate arraying petitioner Bimal Jain as accused No.2, *prima facie* show there were reasons to believe the person was guilty of offence punishable under Section PMLA as the complaint is filed only against a person who is presumed to be guilty. Admittedly, the learned Special Judge, PMLA took cognizance of the complaint filed by the Enforcement Directorate as he reasonably believed petitioner Bimal Jain, being guilty of offence of money laundering.

11. Coming to his second argument viz the complainant and the Investigating Agency cannot be same, I may refer to *Mukesh Singh vs State (NCT) of Delhi* 2020 (10) SCC 120 wherein it was held:-

“8. The question which is referred to the larger Bench is, whether in case the investigation is conducted by the informant/police officer who himself is the complainant, the trial is vitiated and in such a situation, the accused is entitled to acquittal?”

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10.5. Therefore, as such, the NDPS Act does not specifically bar the informant/complainant to be an investigator and officer in charge of a police station for the

investigation of the offences under the NDPS Act. On the contrary, it permits, as observed hereinabove. To take a contrary view would be amending Section 53 and the relevant provisions of the NDPS Act and/or adding something which is not there, which is not permissible.

13.2. (II) In a case where the informant himself is the investigator, by that itself cannot be said that the investigation is vitiated on the ground of bias or the like factor. The question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias and therefore on the sole ground that informant is the investigator, the accused is not entitled to acquittal. The matter has to be decided on a case-to-case basis. A contrary decision of this Court in Mohan Lal v. State of Punjab [Mohan Lal v. State of Punjab, (2018) 17 SCC 627 : (2019) 4 SCC (Cri) 215] and any other decision taking a contrary view that the informant cannot be the investigator and in such a case the accused is entitled to acquittal are not good law and they are specifically overruled.”

12. The last limb of argument was qua twin conditions of 45 of the PMLA. Admittedly the Hon’ble Supreme Court in *Nikesh Tarachand Shah* (supra) declared the Section 45 of the PMLA as it stood then, as unconstitutional and violative of Articles 14 and 21 of the Constitution of India, but the defects pointed out by the Hon’ble Supreme Court in *Nikesh Tarachand Shah* (supra) were cured by the Legislature and an amendment to section 45(1) was made vide the Finance Act, 2018 (No.13 of 2018). Under the amendment Act, section 45(1) was revived and for the words “*punishable for a term of imprisonment of more than three years under part A of the Schedule*”, the words “*under this Act*” were substituted in section 45(1) of the PMLA.

13. The Supreme Court in *P. Chidambaram vs E.D.* (2019) 9 SCC 24

has taken judicial note of such amendment:-

38. The twin conditions under Section 45(1) for the offences classified thereunder in Part A of the Schedule was held arbitrary and discriminatory and invalid in Nikesh Tarachand Shah v. Union of India (2018)11 SCC 1. Insofar as the twin conditions for release of the accused on bail under Section 45 of the Act are concerned, the Supreme Court held (at SCC p. 15. para 3) the same to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. Subsequently, Section 45 has been amended by Amendment Act 13 of 2018. The words "imprisonment for a term of imprisonment of more than three years under Part A of the Schedule" has been substituted with "accused of an offence under this Act..."

14. Further, in *Mohd. Arif vs. Govt. of India*, 2020 SCC OnLine Ori 544, the Orissa High Court has held as under:-

"23. While deciding a bail application, the provisions of Section 45 read with Section 24 which reverses the burden of proof and creates presumption of guilt required to be dislodged by the accused, will mandatorily apply. A similar view of the matter has been reiterated in Rohit Tandon v. Directorate of Enforcement. It may further be held that the reliance placed by the petitioner on Nikesh Tarachand Shah v. Union of India is untenable in view of the fact that Section 45 has been amended (by the Amendment Act 13 of 2018) whereby the original expression "imprisonment for a term of more than three years under Part A of the Schedule" (pre-amendment) now stands substituted by the expression "no person accused of an offence under this Act shall be released on bail or on his own bond". Thus, the contention raised by the petitioner with regard to Section 45 of the Act does not hold good. A similar sentiment has been echoed by the apex court in P. Chidambaram v. Directorate of Enforcement"

15. The Supreme Court has dismissed the SLP as withdrawn against the above judgment of the Orissa High Court vide order dated 24.11.2020 in SLP CrI 4878/2020.

16. The contrary view taken by this Court in *Upendra Rai vs.*

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Directorate of Enforcement 2019 SCC OnLine Del 9086 has also been stayed by the Hon'ble Supreme Court in SLP (Crl) 2598/2020 vide an order dated 03.06.2020. Moreso, contrary view taken by this Court also in *Dr. Shivender Mohan Singh vs. Directorate of Enforcement* 2020 SCC OnLine Del 766, has also been stayed by the Supreme Court vide its order dated 31.07.2020 in SLP(Crl) No.3474/2020 while stating “*Until further orders, status quo with respect to release from jail be maintained and impugned Judgment not to be treated as a precedent for any other case.*”

17. No doubt, the legislature has the power to cure the underlying defect pointed out by a Court, while striking down a provision of law and pass a suitable amendment. In *State of Karnataka v. Karnataka Pawn Brokers Association* (2018) 6 SCC 363 it was held:-

“24. On analysis of the aforesaid judgments it can be said that the Legislature has the power to enact validating laws including the power to amend laws with retrospective effect. However, this can be done to remove causes of invalidity. When such a law is passed, the Legislature basically **corrects the errors** which have been pointed out in a judicial pronouncement. Resultantly, it amends the law, by removing the mistakes committed in the earlier legislation, the effect of which is to remove the basis and foundation of the judgment. If this is done, the same does not amount to statutory overruling.”

18. It is well settled the legislature has the power to cure the underlying defect pointed out by a Court, while striking down a provision of law and pass a suitable amendment. In *Municipal Committee, Amritsar & Ors. vs State of Punjab & Ors.* (1969) 1 SCC 475, it was held:-

“7. We are unable to accept the argument that since the

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High Court of Punjab by their judgment in Mohinder Singh Sawhney case struck down the Act, Act 6 of 1968 had ceased to have any existence in law, and that in any event, assuming that, the judgment of the Punjab High Court in Mohinder Singh Sawhney case did not make the Act non-existent, as between the parties in whose favour the order was passed in the earlier writ petition, the order operated as res judicata, and on that account the Act could not be enforced without re-enactment.”

19. Therefore, merely because the entire section is not re-enacted would be of no consequence since the provision even after being declared unconstitutional, does not get repealed or wiped out from the statute book and it only becomes unenforceable. Therefore, once the Parliament steps in and cures the defect pointed out by a Constitutional Court, the defect appears to be cured and the *presumption of constitutionality* is to apply to such provision.

20. Thus, there is a presumption in favour of constitutionality since the amended section 45(1) of the PMLA has not been struck down, (*see*) *Nagaland Senior Govt. Employees Welfare Assn. v. State of Nagaland* (2010) 7 SCC 643.

21. Now the question is if Section 45(1) of the PMLA is ignored, whether the petitioners are entitled to bail *per* parameter of Section 439 Cr P C.

22. The investigation conducted by the Directorate of Enforcement so far has revealed Naresh Jain along with his brother Bimal Jain and other accomplices hatched a criminal conspiracy to cause loss to the exchequer and banks by indulging in illegal foreign exchange transactions on the basis of forged/ fabricated documents. For the furtherance of conspiracy,

documents like identity proof, birth and education certificate, voter ID, PAN Card and signatures were forged/fabricated to incorporate entities, operating bank accounts, facilitating bogus/over-invoiced/ under-invoiced import and export transactions and rotation of the funds through web of shell companies to cause undue benefit to the parties involved and loss to the exchequer and banks. Naresh Jain also facilitated parking of funds abroad by Indian nationals through his international Hawala transaction structure created in India and in various other jurisdictions. Naresh Jain conducted international Hawala operation and domestic operation of providing accommodation entries to co-conspirators i.e. the beneficiaries in lieu of his commission. For this purpose, Naresh Jain along with his brother Bimal Kumar Jain and other accomplices, confidants, employees and others established a structure of paper entities (barring a few that were doing real business) by incorporating companies or forming other business entities like firm or individual proprietorship. Investigation so far, has revealed that Naresh Jain incorporated and operated 450 Indian entities and 104 foreign entities. These entities were incorporated by using original identity proofs and documents of *dummy* shareholders and directors as well by fabricating identity proofs and documents of these shareholders and directors. Fabricated documents were used to open bank accounts as well.

23. During the investigation conducted so far, out of 450 shell companies, 603 bank accounts of 311 companies have been examined and it has been gathered that Naresh Jain and his accomplices including the Bimal Jain rotated funds approximately to the tune of Rs.96,000 Crores for providing accommodation entries of approximately Rs.18,679

Crores to 973 beneficiaries. Petitioner Bimal Jain was made a director in various companies in which proceeds of crime generated by Naresh Jain and his accomplices were projected as untainted properties and is in possession of proceeds of crime to the tune of Rs.35,78,53,638/-.

24. It is alleged both the petitioners are well connected in India and abroad and there is an apprehension that they will flee from the country to evade trial in case they are enlarged on bail. As alleged above, Bimal Jain has evaded the summons issued by the department and had refused to join investigation. The apprehension qua Naresh Jain finds support from the following fact:

“It was further informed that Dubai Police had arrested Naresh Jain and his 9 accomplices for money laundering activities. Naresh Jain in his statement dated 11.09.2017 recorded under Section 37 of FEMA, 1999 and taken on record in this case vide his statement dated 27.08.2020 recorded under Section 50 of PMLA, 2002, informed that he was arrested in February, 2007 in Dubai and got bail in August, 2007. However, he fled from Dubai in May, 2009 through Nepal. Government of Dubai had sent a report on the case of Naresh Jain which was forwarded by NCB vide their letter dated 20.01.2010. The report indicates that Naresh Jain and his accomplices carried out transfers of money gains worth (2,022,459,177,00 UAE Dirham) resulting from drugs and bribery crimes with the intention to hide their illegal sources.”

25. It is alleged the evidence so far collected indicate Naresh Jain has done Hawala operation of Rs.11,800 Crore approx in 104 foreign entities, details of which have been gathered so far.

26. Further, it is alleged by the Enforcement Directorate the

petitioners are involved in various criminal cases in India and abroad too including, USA, Britain, Dubai etc and even two *Red Corner Notices* have been issued by the Interpol against Naresh Kumar Jain. The USA Southern District Court of New York vide its Order dated 16.06.2009 upheld the forfeiture of assets worth USD 43,72,653/- of Naresh Jain and his accomplices in a money laundering case.

27. It is alleged Naresh Jain has continued the business of international Hawala and domestic accommodation entries; by keeping himself under veil and adopted measures i.e. kept his offices secret; hired premises for his operations; got rent agreements of rented premises signed by his employees; employees were paid in such a way that they could not be linked with him directly; got SIM cards issued in the name of other persons for himself and his employees and accomplices to conduct business and avoid detection; incorporated entities with dummy shareholders and directors; and his name does not appear anywhere in documents. Even the allegations are the petitioners have forged their medical certificates and Naresh Jain continues the criminal activities while in Jail and the investigation in the case is still going on and a large number of activities/fact accounts/witnesses /employees and beneficiaries are involved.

28. It is also alleged if enlarged on bail there is every likelihood the petitioners may flee to Dubai or elsewhere to avoid the process of law and they are *flight risks*.

29. Thus, in the circumstances stated above, I am not inclined to grant bail to both the petitioners. The petitions are dismissed. Pending

application, if any, also stands disposed of.

30. Nothing opined above, shall not be treated as an observation on merits of claim of either side.

YOGESH KHANNA, J.

JULY 30, 2021

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