IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO.218 OF 2022

Saeed Khan Shergul Khan ...Applicant
Versus
The Union of India and Anr. ...Respondents
...
Mr. Satish Maneshinde, with Ms Anandini Fernandes, Ms Deepal Thakkar, Ms Namita Maneshinde i/b. Mr. Shrikant Shirsath for the Applicant.
Mr. S.H. Yadav, APP for Respondent -State.
Mr. Hiten Venegaonkar with Mr. Saurabh Kshirsagar and Mr. Harsh Dedhia for Respondent -E.D.

CORAM : SMT. ANUJA PRABHUDESSAI, J.

ORDER PRONOUNCED ON : 01/07/2022.

<u>ORAL ORDER:-</u>

1. This is an application for bail filed by the aforesaid Applicant, who was placed under arrest on 27/09/2021 in ECIR/MBZO-1/78/21 for alleged offence punishable under Section 3 r/w Section 4 of Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'PMLA Act').

2. The allegations against the Applicant are that he in connivance with the co-accused Bhavna Gawali, siphoned off huge amount of money from Mahila Utkarsha Pratishthan, Risod, (hereinafter referred to as 'the

Trust') for his personal use. The Applicant and the co-accused converted the Trust into Section 8 Company on the basis of forged and fabricated documents. The Applicant diverted an amount of Rs.3.75 crores in the account of Deepak Prajapati and his family members in various tranches. The said amount was later transferred in the account of M/s. Master Plan Finance Ltd., of which Deepak Prajapati is the director.

3. It is alleged that Deepak Prajapati, who is engaged in providing accommodation entries and bogus loans, provided a transaction entry of 3.58 crore to the Applicant under the garb of loan. The said amount, which was provided as loan was utilised by the Applicant for purchase of a property i.e. office No.16, Nariman Bhavan, Nariman Point, Mumbai. It is alleged that the Applicant was an active participant in the generation of proceeds of crime and that he was actually involved in the laundering of said proceeds of crime as defined under Section 3 of the PMLA.

4. Mr. Satish Maneshinde, learned counsel for the Applicant submits that the Applicant had no direct relationship with the Trust, except for heading the Fraud Detection Committee. He was not a signatory to the bank account of the Trust. In fact, the signatories to the

bank account of the Trust were Bhavna Gawali and Ashok Gandole. Bhavna Gawali had authorised Ashok Gandole to operate the Bank account of the Trust till July-2019 and thereafter the accounts were overseen by Bhavna Gawali and her relatives.

5. Mr. Maneshinde, learned counsel submits that in view of suspicious transactions and financial discrepancies in the account of the Trust, Bhavna Gawali decided to convert the Trust into a Company to safeguard the interest of the Trust and to ensure transparency in its financial dealings. The decision to convert the Trust into Company was confirmed by the other Trustees. In pursuance of the resolution, no objection accorded by the Charity Commissioner and Pusad Bank, the Trust came to be converted into a Company. It is submitted that there is no material on record to indicate that the Applicant was in any way responsible for the said decision and /or for converting the Trust into a Company.

6. Learned counsel for the Applicant submits that the report prepared by Hakim Shaikh, a Chartered Accountant appointed by Bhavna Gawali reveals that there were gross financial discrepancies and apparent misappropriation of funds hence Bhavna Gawali had lodged FIR pursuant

to which crime was registered against Ashok Gandole and other Trustees. The Applications filed by Ashok Gandole and others to quash the FIR have been dismissed by the Division Bench of this Court by order dated 24/02/2022. He submits that this Court has observed that Ashok Gandole was incharge of the affairs of the Trust. Said Ashok Gandole and other members of the Trust had withdrawn large amount of cash from the account of the Trust.

7. Mr. Maneshinde, learned counsel submits that the Applicant purchased the office premises in an auction held by the Official Liquidator as per the order of this Court. The Applicant had arranged for a loan from M/s. Master Plan Pvt. Ltd., which was deposited into the account of Official Liquidator on or before 20/08/2019. It is submitted that the Applicant was not involved with the Trust in any manner as on the date the loan was availed and the sale was confirmed.

8. Mr. Maneshinde, learned counsel further submits that the amount of Rs.20,00,000/-, which was paid to the Applicant by cheque and Rs.14,00,000/- which was transferred by RTGS was in respect of repair work carried out by him and that the said amount is included in his income for the Assessment Year-2020-2021 and is also reflected in his

income tax returns. The amount of Rs.1,00,00,000/- was withdrawn by cheque by Bhavna Gawali and is reflected in the audited account of the Company.

9. Learned counsel for the Applicant submits that the Applicant is not involved in committing offence under PMLA. That the charge-sheet has been filed and the co-accused are either on bail or are not arrested. He submits that the Applicant, who is in custody since 27/09/2021 is entitled for bail.

10. Per contra, Mr. Hiten Venegaonkar, learned counsel for Respondent No.1 submits that the Applicant in connivance with Bhavna Gawali has taken over control of the Trust by converting the Trust into Section 8 Company on the basis of forged and fabricated documents. He submits that the amount from the Trust is withdrawn in cash and that the said amount has been utilised for personal use. He submits that an amount of Rs.20,00,000/- from the account of the Trust was transferred to the account of the Applicant on 20/12/2019. Similarly, on 16/11/2019 an amount of Rs.14,00,000/- from the account of one of the institutions of the Trust was transferred in the account of the Applicant. On 02/06/2020, after converting the Trust into a Company, Rs.2,81,03,228/-

was transferred from the account of Bhavana Public School to a newly opened account of Bhavna Public School and an amount of Rs.1 crore from the said account was withdrawn from the said account on the very next date.

11. Mr. Venegaonkar, learned counsel for Respondent No.1 further submits that the amount siphoned off by the Applicant was paid in cash to Deepak Prajapati, who in turn merely provided a transaction entry of Rs.3.58 crores to the Applicant under the garb of loan. The said payment was then utilised for purchasing office No.16 at Nariman Point. Learned counsel for Respondent No.1 has relied upon the decision of ***P. Chandambaram vs. Directorate of Enforcement*** in ***Criminal Appeal No.1340 of 2019*** and the decision of this Court in ***Ajay Kumar vs. Directorate of Enforcement in Criminal Application (BA) No.1149 of 2021*** to contend that in order to grant bail it is necessary to record satisfaction as required under the twin conditions in Section 45(1) of PMLA. Reliance is also placed on the decision of this Court in ***Marath Shashidharan vs. Directorate of Enforcement*** in ***Criminal Bail Application No.1046 of 2021.***

12. I have perused the records and considered the submissions advanced by the learned counsel for the respective parties.

13. At the outset, it may be mentioned that Section 45 of the PMLA imposes two conditions for grant of bail to any person accused of an offence punishable for a term of imprisonment of more than three years under part A of the schedule of the Act viz, (i) the public prosecutor must be given an opportunity to oppose the application for such bail; (ii) where the public prosecutor opposes the application, the Court must be satisfied that there are reasonable grounds for believing that the accused person is not guilty of such offence and is not likely to commit any offence while on bail. In view of conflicting views expressed by learned Single Judges of this Court, the question '*whether the twin conditions in Section 45(1) of the 2002 Act, which was declared unconstitutional by the judgment of the Apex Court* ***in Nikesh T. Shah vs. Union of India, (2018) 11 SCC 1,*** *stands revived in view of the legislative intervention vide amendment Act 13 of 2018,'* was referred to the Division Bench in ***Ajay Kumar*** (supra). The Division Bench of this Court after considering the relevant provisions and the decisions has observed that :-

> *49… Unless the amended provision is struck down by the Courts, it cannot be watered down. Since after the amendment the entire complexion of section 45 has been changed, we are not in agreement with the contention that the entire section has to be re-enacted by way of*

amendment after decision in the case of Nikesh Shah(supra). Therefore, in our opinion, the twin condition would revive and operate by virtue of Amendment Act, which is on date in force. In view of that, we answer the reference by stating that the twin conditions in section 45(1) of the 2002 Act, which was declared unconstitutional by the judgment of the Apex Court in Nikesh T. Shah vs. Union of India (2018) 11 SCC 1, stand revived in view of the Legislative intervention vide Amendment Act 13 of 2018."

14. It would also be relevant to refer to the decision in ***Ranjitsingh Brahmajeetsingh Sharma vs. State of Maharashtra and Anr. (2005) 5 SCC 294*** wherein the Hon'ble Supreme Court, while interpreting the embargo under Section 21 (4) of MCOC Act, which is pari materia with Section 45 of PMLA, has observed thus:-

> *"35. Presumption of innocence is a human right. [See Narendra Singh and Another Vs. State of M.P., (2004) 10 SCC 699, para 31] Article 21 in view of its expansive meaning not only protects life and liberty but also envisages a fair procedure. Liberty of a person should not ordinarily be interfered with unless there exist cogent grounds therefor. Sub-Section (4) of Section 21 must be interpreted keeping in view the aforementioned salutary principles. Giving an opportunity to the public prosecutor to oppose an application for release of an accused appears to be reasonable restriction but Clause (b) of Sub-section (4) of Section must be given a proper meaning.*
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> *36. Does this statute require that before a person is released on bail, the court, albeit prima facie, must come to the*

conclusion that he is not guilty of such offence? Is it necessary for the Court to record such a finding? Would there be any machinery available to the Court to ascertain that once the accused is enlarged on bail, he would not commit any offence whatsoever?

37. Such findings are required to be recorded only for the purpose of arriving at an objective finding on the basis of materials on records only for grant of bail and for no other purpose .

38. We are furthermore of the opinion that the restrictions on the power of the Court to grant bail should not be pushed too far. If the Court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the Court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Indian Penal Code may debar the Court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. What would further be necessary on the part of the Court is to see the culpability of the accused and his involvement in the commission of an organised crime either directly or indirectly. The Court at the time of considering the application for grant of bail shall consider the question from the angle as to whether he was possessed of the requisite mens rea. Every little omission or commission, negligence or dereliction may not lead to a possibility of his having culpability in the matter which is not the sine qua non for attracting the provisions of MCOCA. A person in a given situation may not do that which he ought to have done. The Court may in a situation of this nature keep in mind the broad principles of law that some acts of omission and commission on the part of a public servant may attract disciplinary proceedings but may not attract a penal provision.

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44. The wording of Section 21(4) , in our opinion, does not lead to the conclusion that the Court must arrive at a *positive finding that the applicant for bail has not committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the Legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the Court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the Court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.*

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46. The duty of the court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. However, while dealing with a special statute like MCOCA having regard to the provisions contained in Sub-section (4) of Section 21 of the Act, the Court may have to probe into the matter deeper so as to enable it to arrive at a finding that the materials collected against the accused during the investigation may not justify a judgment of conviction. The findings recorded by the Court while granting or refusing bail undoubtedly would be tentative in nature, which may not have any bearing on the merit of the case and the trial court would, thus, be free to decide the case on the basis of evidence adduced at the trial, without in any manner being prejudiced thereby.”

15. Reverting to the facts of the present case, the thrust of the accusations against the Applicant is that he in connivance with the co-

accused Bhavna Gawali cheated and misappropriated the funds of the Trust, for his personal use. The Applicant credited cash of Rs. 3.58 crores into the account of Deepak Prajapati, who transferred the money into the account of M/s. Master Plan Finance Ltd, of which he is one of the Directors. Said Deepak Prajapati aided money laundering by effecting a loan entry to give legitimacy to the proceeds of crime and/or to disguise the illicit nature of criminal proceeds. The said payment was then utilized by the applicant to purchase office No.16 on the first floor of Nariman Bhavan at Nariman Point.

16. It is pertinent to note that Bhavna Gawali, was the Chairperson of the trust registered in November, 1998. The said Trust runs various educational institutions. Bhavna Gawali and her Personal Assistant and Secretary Ashok Gandole were the authorized signatories of the accounts of the Trust. The records indicate that Bhavna Gawali had constituted Fraud Detection Committee, headed by the Applicant herein, suspecting financial discrepancies in the accounts of the Trust. The Fraud Detection Committee had allegedly scrutinized and identified the cash vouchers, which were allegedly issued on bogus names or in the names of the relatives of Ashok Gandole and the other trustees. Bhavna Gawali appointed Hakeem Shaikh, a Chartered Accountant to prepare a detailed

report on the financial dealings of the Trust. Based on the report submitted by Hakim Shaikh, Bhavna Gawali lodged FIR dated 12.05.2020, pursuant to which crime No.0389 of 2020 came to be registered against Ashok Gandole and other trustees for committing offences of fraud, cheating and misappropriation of an amount of Rs.18,18,40,867/- from the account of the said Trust.

17. While the said crime was being investigated, suspecting it to be the case of money laundering, the Enforcement Directorate registered ECIR/MBZO-1/78/21 and arrested the Applicant on 27/09/2021. It is alleged that on 16.11.2019, an amount of Rs.14 lakhs was transferred to the account of the Applicant from the account of Principal, BAMS College. On 20.12.2019 an amount of Rs. 20 lakhs was transferred from the account of the Trust at BMC Bank, Aurangabad, Ladies Branch, to the account of the Applicant in Bombay Mercantile Co-op. Bank Ltd. On the same date, an amount of Rs. 9 Lakhs from the said amount was transferred by the Applicant in the account of Naser Khan Sattar Khan Pathan, and on 2.1.2020, an amount of Rs.10 Lakhs was transferred into the account of M/s. Ellora Constructions.

18. It is pertinent to note that an amount of Rs.14 lakhs was

transferred into the account of the Applicant through RTGS, whereas, an amount of Rs.20 lakhs was paid to the Applicant by cheque. A perusal of the statement of the Applicant recorded under Section 50 of PMLA reveals that he was not questioned on the transfer of amount in his account and he was not given any opportunity to offer his explanation as regards the said amount credited in his account. It appears that no attempt was made to ascertain whether the money which was received by cheque and transferred by RTGS was included in the computation of his total income for the assessment year 2020-2021 and/or reflected in his Income Tax returns.

19. The complaint does not make any reference to the statements of Naser Khan, Mohd. Sattar Khan or the authorized person from M/s. Ellora Construction, in whose account the Applicant had transferred the said money. Prima facie it appears that the allegations of cheating and misappropriation are leveled without ascertaining whether the money was paid to the Applicant towards his legal dues.

20. The office premises being office No.16 at Nariman Bhavan, which is purchased by the Applicant was originally owned by M/s. Madras Petrochem Ltd., Mumbai. The said company was wound up by the order

of the Court and the Official Liquidator was directed to sell the said property. By order dated 26.07.2019 the Court accepted the offer of the Applicant and confirmed the sale of the said office for an amount of Rs.3.75 Crores. The Applicant had availed loan of Rs.3.58 Crores from M/s. Master Plan Finance Ltd., and the said amount was credited into the account of Official Liquidator on 28.08.2019.

21. It is alleged that the Applicant had withdrawn cash of Rs.3.58 crores from the accounts of the Trust and credited the said amount into the accounts of Deepak Prajapati and his family members. The withdrawal from the account of the Trust as well as deposit of the money in the account of Prajapati was of the year 2019. The Applicant was neither a trustee nor an authorized signatory of the Trust during this period. He became the Director of the Company only on 03.01.2020 whereas the transaction regarding purchase of the office premises was completed in August 2019. During this period the Applicant was not authorized to withdraw any money from the account of the Trust and was not in any manner connected or involved with the Trust, save and except heading the Fraud Detection Committee constituted in September-2019. Hence, prima facie the Applicant cannot be foisted with financial misconduct in respect of the Trust during this period.

22. The averments in the complaint as well as the statement of the Applicant does not indicate that he was questioned on either withdrawal of cash from the account of the Trust or deposit of cash of Rs.3,46,75,500/- in the account of Deepak Prajapati and his family members from 08/05/2019 till 10/12/2019. When questioned about huge cash deposits in the Bank account, Deepak Prajapati in his statement recorded under Section 50 of PMLA has explained that he is involved in the business of contract farming. He has about 250 acres of agriculture land wherein actual farming is done by the local farmers. The expenses of the farming is incurred by him and he receives 75% of the profit from the agricultural produce and the farmers cultivating the land received the remaining 25%. He has stated that the cash deposits in various accounts in his name and in the names of his family members are from the revenue generated from the business of contract farming. He has stated that withdrawals from these bank accounts is to cover expenses towards the contract farming activities. He has further stated that monthly cash deposit in his account and in the accounts of his family members is approximately 1.5 to Rs.2 crores and that the annual net cash deposit is around 10 crores cumulative.

23. The only incriminating material against the Applicant is in the form of the statements of Upendra Mule, Ashok Gandole, Uddhav Gandole, Vinod Pandhare, Santosh Somani, Bharat Devgire and others, who are the accused in crime No.389 of 2020 registered at Risod Police Station, pursuant to the complaint lodged by Bhavna Gawali for cheating and misappropriating the money of the Trust. Said Ashok Gandole and others had filed applications before the Division Bench of this Court at Nagpur Bench for quashing the said FIR. While dismissing the said applications, the Division Bench of this Court had prima facie observed that Ashok Gandole was Incharge of the affairs of the Trust and the other Applicants were connected with him. The Division Bench of this Court has prima facie observed that huge sum of cash was withdrawn on vouchers and for a corresponding period, substantial deposits have been made in the personal account of those who were Incharge of the Trust i.e. Ashok Gandole and others. It is observed that Ashok Gandole and others are alleged to have deposits in their personal accounts and have substantial properties. In the light of these observations, the statements of these witnesses recorded under Section 50 of the PMLA will have to be tested in evidence during trial.

24. Considering the totality of the circumstances, prima facie the

offence of cheating is not made out and in all probability, the Applicant may not be ultimately convicted for offence of money laundering. In the absence of any material as regards criminal antecedents of the Applicant, it can be held that there is no possibility of the Applicant committing such crime in future. Most of the co-accused are either on bail or are not arrested. The Applicant is in custody since September, 2021. The charge sheet has been filed and considering the large pendency, the trial is not likely to commence and conclude in the immediate future. The Applicant is a permanent resident of the State and there is no likelihood of the Applicant absconding or tampering with the evidence. Considering the above facts and circumstances, it is not necessary to detain the Applicant any further. Hence, case is made out for grant of bail.

25. The bail application is allowed on the following terms and conditions:-

(i) The Applicant, who is arrested in C.R. No.ECIR/MBZO-1/78/2021 is ordered to be released on cash bail in the sum of Rs.1,00,000/- for a period of four weeks;

(ii) The Applicant shall, within the said period of four weeks furnish PR bonds in the sum of Rs.1,00,000/-

with one or more sureties in the like amount;

(iii). The Applicant shall surrender his passport before the Trial Court;

(iv).The Applicant shall not leave India without prior permission of the Trial Court;

(v). The Applicant shall not tamper with the evidence in any manner;

(vi). The Applicant shall keep the Investigating Officer informed of his current address and mobile contact numbers, and/or change of residence or mobile details, if any, from time to time;

(vii). The Applicant shall report to the Enforcement Directorate on the first Monday of every month between 11.00 a.m. to 1.00 p.m. until further orders.

26. The application stands disposed of.

(SMT. ANUJA PRABHUDESSAI, J.).