IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 400 OF 2022

Akbar Hussain @ Raju Batla @ Raju
Bhai @ Bhai s/o Shafi Hussain … Appellant

Versus

National Investigation Agency and Anr. … Respondents

Ms. Payoshi Roy i/b Dr. Yug Mohit Choudhary, for the Appellant.
Mr. Sandesh Patil a/w Chintan Shah, for Respondent No.1-NIA.
Mrs. P.P. Shinde, APP for the Respondent No.2– State.
Ms. Surekha Jaunjal, PI, NIA, Mumbai.

CORAM : REVATI MOHITE DERE &
V. G. BISHT, JJ.

DATE : 16th JUNE 2022.

ORDER : (PER : V. G. BISHT, J).

. Heard. Admit. By consent, heard finally at the stage of admission.

2 This is an appeal preferred by the applicant-accused under 21 of the National Investigation Agency Act ('NIA' for short) read with Section 43-D(5) of Unlawful Activities (Prevention) Act, 1967 (' the 1967 Act' for short) against the order passed below Exhibit 82 in

NIA Special Case No. 681 of 2020 thereby rejecting the bail application.

3 Brief relevant facts are as under :

(a) C.R.No.43 of 2020 was registered by Sahar Police Station, Mumbai on 9th February 2020 under Sections 489B, 489C, 120B and 34 of the Indian Penal Code (IPC). It is the case of prosecution that genuine Indian currency of Rs.350 and 1193 Fake Indian Currency Notes (FICN for short) in denomination of Rs.2,000/- having total face value of Rs.23,86,000/- were recovered from one Mr.Javed Gulamnabi Shaikh, who was arrested by the police on 9th February 2020. The Central Government in exercise of its powers under Section 6(5) read with 8 of the National Investigation Agency Act, 2008 (NIA Act for short) suo moto directed the NIA to take up the investigation and accordingly, a case came to be re-registered at NIA Police Station, Mumbai, vide RC-03/2020/NIA/MUM for alleged offences 489B, 489C, 120B and 34 of the IPC.

(b) During the course of investigation, the said recovered FICN were sent to the Currency Note Press, Nasik, for examination and opinion. Currency Note Press, Nasik, opined that the said seized FICN were "High Quality Counterfeit Notes" as the key security features as specified in the Third Schedule of the Unlawful Activities (Prevention) Act, 1967 (UAP Act for short) had been "imitated" in the said FICN. Accordingly, Section 15(1)(a)(iiia) read with Sections 16 and 18 of UAP Act were invoked.

(c) The prosecution alleges that accused Javed Gulamnabi Shaikh was smuggling said FICN in collusion with Surinder Kumar Bharose Lal @ Sardar and the said FICN were to be handed over to the appellant and one Jairam.

(d) After completion of investigation, on 05/08/2020 NIA filed charge-sheet against the accused Javed Gulamnabi Shaikh under Sections 489B, 489C, 120B r/w 34 of Indian Penal Code ('IPC' for short) and Section 15(1)(a)(iiia) and Section 16 of the 1967 Act vide Special Case No. 681 of 2020.

(e) During further investigation the involvement of accused Kishor Kumar Agarwal @ Guptaji (A-2), the present appellant and wanted accused Sardar was revealed and accordingly, A-2 and present appellant were arrested on 23/09/2020 and 27/11/2021, respectively.

(f) On 18/02/2021, NIA filed the supplementary charge-sheet against A-2, the appellant (A-3) and wanted accused Surinder Kumar Bharose Lal @ Sardar.

4 Ms.Roy, learned Counsel for the appellant-accused, vehemently submits that that the prosecution has not collected any material that would show that the appellant had either sold, bought, received, trafficked or used as genuine counterfeit currency or that appellant was found in possession of counterfeit currency. According to learned Counsel, although the prosecution alleges that the appellant arranged accused No.1's ticket and Visa to Dubai and also provided financial assistance but that does not in any manner incriminate him. Mover over, the statements relied on by the prosecution are unreliable and do not in any manner present the

strong case for prosecution. The charges against the appellant - accused are purely conjectures based entirely on suppositions and presumptions. Since no prima-facie case is made out, the question of bar of Section 43(D) of the 1967 Act would not operate against the appellant. For all these reasons, the appellant-accused deserves to be enlarged on bail, urged learned Counsel.

5 Per contra, Mr. Sandesh Patil, learned counsel for NIA, opposes the submissions advanced by learned counsel for the appellant and vehemently submits, at the outset, that there being *prima-facie* evidence against the appellant-accused, the appellant-accused cannot be enlarged on bail in view of Section 43(D) of the 1967 Act. The learned Counsel then invited our attention to the various statements of witnesses upon which he intends to place heavy reliance. The learned Counsel took us through those statements one by one, which we would be analyzing and elaborating herein-after, and would submit that there being no merit in the Appeal, the same is liable to be dismissed.

6 Since both i.e. learned Counsel for the appellant-accused and

learned Counsel for NIA have pointed out various statements of prosecution witnesses to their advantage and that being only evidence, we deem it proper to assess those statements in proper perspective in order to find out whether indeed and in fact, the prosecution has made out a strong case for rejection of bail or for that matter, a case for bail.

7 We have minutely and carefully read the statements relied on by learned Counsel for both the parties. A closure look at these statements would clearly show how poorly the contents of all these statements are set and it will be unwise to read too much into these statements. We would like to qualify our observations with reasons.

8 The first statement is of PW-16 at page 256. PW-16 is brother-in-law of the appellant-accused. It is his statement that on 05/02/2020 in the afternoon his brother-in-law, present appellant-accused, asked him to meet Mr. Jahangir, owner of Next Level Tours and Travels at K. D. Complex, Nagpada and collect the air ticket of Javed Shaikh (A-1) as latter was going to Dubai from Mumbai International Airport, Andheri at about 01:25 hours on 06/02/2020.

This witness accordingly met Jahangir and collected one white colour envelope containing Air ticket and Visa copy of Javed Shaikh and informed his brother-in-law. He then came back at home and collected one bag containing household material which was given by appellant-accused for handing over to Javed Shaikh (A-1) and as the same was to be delivered at Dubai Airport to Mr. Fahim, brother-in-law of Akbar Hussain resident of Dubai. Later on, he met Javed Shaikh (A-1) at Mumbai International Airport and handed over the Air ticket and bag.

9 From the above statement two things are clear. First, this witness is brother-in-law of appellant-accused and second, on the direction of appellant-accused this witness collected Air ticket, Visa and household material and handed over the same to Javed Shaikh (A-1) at Mumbai International Airport. We do not find anything incriminating which could be attributed on the part of appellant-accused.

10 PW-19 at page No. 260 states that he is running a business of travel agency in the name and title of M/s Jhaveri International

Tours and Travels. On 05/02/2020 Mr. Jahangir of M/s. Next Level Tours and Travels sent him a mail to arrange a Air ticket of Indigo Flight No. 6E-1768 from Mumbai to Dubai of dated 06/02/2020 in the name of Javed Gulamnabi Shaikh (A-1) alongwith Visa. Accordingly, he arranged Air ticket and Visa. It may be noted that PW-19 is the same person from whom PW 16 referred herein-above, had collected a Air ticket and Visa for Javed Shaikh (A-1). This statement also does not in any manner indicate anything wrong on the part of appellant-accused.

11 PW-20 at page No. 261 states that he is running a business of travel agency in the name and style of M/s Next Level Tours and Travels. On 05/02/2020, Akbar Hussain @ Raju Batla i.e. appellant-accused herein asked him to arrange a Air ticket and Visa in the name of Javed Gulamnabi Shaikh (A-1) from Mumbai to Dubai for 06/02/2020. We have already pointed out that PW-16 had collected the Air ticket and Visa from one Jahangir, owner of Next Level Tours and Travels i.e. present witness i.e. PW-20. This statement also leads us nowhere.

12 PW-20 at page 262 states that on being asked by Akbar Hussain @ Raju Bhai i.e. the appellant-accused, he had booked tickets and Visa for accused Surinder Kumar @ Sardar and according to him, he had met Sardar at appellant-accused's daughter's wedding ceremony.

13 From the above statements, what emerge is that on the say of present appellant-accused the tickets and Visas were booked in the name of Javed Shaikh (A-1) and Sardar.

14 PW-47 is wife of accused Javed and whose statement is at page No. 233. She states that on 05/02/2020, at about 7:00 p.m. a person by name, Raju Bhai i.e. appellant-accused had called Javed 12 times but as Javed had gone to play cricket at Kalwa ground, he did not answer. Again at around 8:00 p.m. Javed answered Raju Bhai's call and Raju Bhai forced him to go to Dubai as his tickets and Visa were already booked by him. Pertinently enough, prosecution has not been able to place on record CDR in respect of number of calls allegedly made by appellant-accused to accused Javed.

15 We then, come to the statement of PW-48 at page No.235, who states that on 06/02/2020 at midnight she met Javed Shaikh (A-1) for first time at Dubai Airport and handed over 220 dirhams to him on the direction of her friend, namely, Akbar Hussain @ Raju Bhai, appellant-accused, as the latter had informed her on 05/02/2020 about a person visiting Dubai for some official work and had requested to arrange some funds and hotel during his stay at Dubai. Again the statement being vague, we are unable to decipher anything to the advantage of prosecution.

16 From the reading of above statements and to our understanding, the learned Counsel for NIA is evidently reading far too much into these statements. The learned Counsel wanted to persuade us to draw inferences about the implicit involvement of appellant-accused in the alleged offences, which we are afraid to do so. Hopes of an existence of a *prima-facie* case cannot be held very high if the nature and the contents of statements are anything to go by. We are entirely with the learned Counsel for appellant-accused when she argues that the accusations against the present appellant-accused are purely conjectures based entirely on suppositions and

presumptions. We fail to understand how these statements as discussed by us *prima facie* incriminate the appellant- accused in the present offence in any way.

17 The argument of learned Counsel for NIA loses its edge when we do not find any material which would show that the appellant-accused has either sold, bought, received, trafficked and use as genuine counterfeit currency or was found in possession of fake Indian currency notes. In the premise, common sense would prompt the conclusion about the non existence of *prima facie* case against the appellant-accused. The material on record does not serve to strengthen the case of prosecution.

18 Since some of the offences are punishable under special enactment, such as the 1967 Act and as argued by learned Counsel for NIA about embargo of Section 43(D) of the 1967 Act, sub sections (5) (6) and (7) are required to be kept in mind. Section 43(D) of the 1967 Act reads thus:-

> "43D. **Modified application of certain provisions of the Code.**— xxx xxx xxx xxx

(5) Notwithstanding anything contained in the Code, no person accused of an offence punishable under Chapters IV and VI of this Act shall, if in custody, be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity of being heard on the application for such release:

Provided that such accused person shall not be released on bail or on his own bond if the Court, on a perusal of the case diary or the report made under section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is *prima facie* true.

(6) The restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail.

(7) Notwithstanding anything contained in sub-sections (5) and (6), no bail shall be granted to a person accused of an offence punishable under this Act, if he is not an Indian citizen and has entered the country unauthorisedly or illegally except in very exceptional circumstances and for reasons to be recorded in writing."

19 By virtue of the provisions of sub-section (5), it is the duty of the Court to be satisfied that there are reasonable grounds for believing that the accusation against such person is *prima facie* true or otherwise. Needless to say, the expression "*prima facie* true" encompasses in its ambit, the materials/evidence collated by the investigating officer for the accusation against the concerned accused. On its face it must show the complicity of accused and the commission of the alleged offences. It has to be based on reasonable grounds leading to the belief that the accusation against the accused is *prima-facie* true.

20 We have very closely and meticulously gone through the statements of prosecution witnesses and have also given our findings as to their nature and contents thereof. Totality of the material gathered by the investigation agency *qua* appellant-accused and presented before us does not *prima face* point out the involvement of the appellant-accused in the aforesaid offences. Therefore, in our considered view, the embargo of Section 43(D) of the 1967 Act is beyond invocation and can not be taken recourse to by learned Counsel for NIA.

21 For the aforesaid reasons, we are satisfied that the appellant has made out a case for bail. Hence, the following order:

ORDER

i) The Appellant be enlarged on bail on furnishing P.R. Bond in the sum of Rs.2,00,000/- (Rs. Two lakhs Only) with one or more solvent sureties.

ii) The Appellant shall attend the National Investigation Agency, Mumbai on the first Saturday of every month from 12-00 a.m. to 2-00 p.m., till the conclusion of the trial.

iii) The Appellant shall surrender/deposit his passport, if any, in the trial Court, before his release.

iv) The Appellant shall inform their latest place of residence and mobile contact number immediately after being released and/or change of residence or mobile details, if any, from time to time to the trial Court as well as to the concerned Police Station, in writing.

v) The Appellant shall not tamper with the evidence or attempt to influence or contact the complainant, witnesses or any person concerned with the case.

vi) The Appellant shall co-operate in the conduct of the trial and shall attend the trial Court on every date of hearing, unless exempted by the trial Court.

22 It is clarified that observations made in this order are *prima facie* observations only made for the purpose of deciding the instant appeal moved by the appellant. None of the observations in this order shall be construed to mean any expression of opinion on merits of the case. Similarly, observations made in this order shall have no bearing on trial of the case.

23 All concerned to act on the authenticated copy of this order.

V. G. BISHT, J. **REVATI MOHITE DERE, J.**