IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM:

RESERVED ON : 16.08.2022

PRONOUNCED ON : 23.08.2022

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

Crl.O.P.No.16848 of 2022

Sidhant Gupta ... Petitioner

Vs.

The Assistant Director,
Directorate of Enforcement,
Ministry of Finance, Government of India,
Chennai-I Zonal Office,
2nd & 3rd Floors, C Block, Murugesa Naicker Office
Complex, No.84, Greams Road, Thousand Lights,
Chennai-600 00 ... Respondents

PRAYER: Criminal Original Petition is filed under Section 439 Cr.P.C and Section 45 of PMLA, seeking to enlarge the petitioner on bail in connection with ECIR/CEZO-I/14/2017 on the file of the respondent.

For Petitioner : Mr.B.Kumar, Senior Counsel
for M/s.S.Ramachandran,

For Respondent : Mr.P.Sidharthan,
Special Public Prosecutor
for ED cases

O R D E R

The petitioner, who was arrested and remanded to judicial custody on 13.06.2022 for the alleged offences punishable under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 in F.No.ECIR/CEZO-I/14/2017 pending on the file of the respondent, seeks bail.

2. The FIR has been registered in F.No.ECIR/CEZO-I/14/2017 with the allegation that 19 firms fraudulently opened current accounts in Punjab National Bank, Mint Street, Chennai. During the year 2015, the unknown public servants of the bank entered into criminal conspiracy with 19 account holders and abused their official position and in furtherance to the criminal conspiracy, they were sending foreign exchange to Hong Kong without genuine business transactions; that the modus operandi was that the remittances from various banks to their accounts by way of RTGSs and presented to make request, issued by foreign suppliers for 100% advance remittances. Each remittance amount was kept in such a way that it could not exceed the threshold limit of 1,00,000 USD in order to circumvent the regulatory requirements and

applicability of RBI. There were around 700 advance remittances made for the import through various current accounts opened during the period from January 2015 to May 2015 to the tune of INR 424.58 Crores. All the advance remittances were routed through Nostro account maintained with HSBC, New York. The Bank verified the addresses of the said account holders on the advice of the Concurrent Auditors and found that none of the units were functioning in the available addresses. Thus, it is a case of money laundering through shell companies and there has been loss of foreign exchange to the tune of INR 424.58 Crores.

3. Further, it is alleged that the 19 bank accounts of Punjab National Bank, carried out 772 transactions and sent foreign exchange to the extent of USD 70871531.02/- equivant to INR 449,78,62,434/- outside India in the guise of advance import remittance. Despite, no import had taken place and the majority of the amount got diverted to Hong Kong and United Arab Emirates. As far as the petitioner is concerned, he had traveled to Hong Kong and incorporated several entities along with the bank accounts.

4. According to the case of the prosecution, the petitioner has received the amount to the tune of Rs.2,50,86,018/- in the name of M/s.Sanjita Polymet Limited. The said money is unaccounted tainted money and it had been sent from untraceable dummy entities accounts in India to Hong Kong in the guise of advance towards import. Hence the case.

5. The learned Senior Counsel for the petitioner submitted that before the arrest of the petitioner, he was called for investigation on two occasions, without satisfying with the Audit reports and balance sheets produced by the petitioner, the respondent prepared documents containing reasons for arrest. The petitioner is the director of M/s.Sanjitha Polymet Limited but is neither a shareholder nor in-charge or responsible for the day by day working of the said company. There is no basis for the respondent to assume that the company was a shell company and was incorporated only for the purpose of parking proceeds of crime.

6. It is seen that originally the FIR was registered on 08.09.2017 as

against M/s.Pajero Impex and 18 other entities and unknown public servants of Punjab National Bank and others. However, it is pertinent to mention that the petitioner is not named as an accused in the FIR and he was arrested, without following due safeguards provided under Section 41 A Cr.P.C., which position has been iterated by the Hon'ble Supreme Court in the case of ***Arnesh Kumar Vs. State of Bihar, 2014 8 SCC 273*** for the offences alleged by the prosecution punishable with seven years or less period of imprisonment, as such the bail application can be considered liberally when compared to bail applications for other offences where the punishment is more than seven years. It is to be noted that the petitioner has no role in the predicate offences and without the existence of a predicate offence, there can be no proceedings under Prevention of Money Laundering Act (hereinafter in short 'PMLA'). The Court cannot proceed on the basis of the preponderance of probabilities in cases of the PMLA. It is against common sense and against the very concept of PMLA that an offence of money laundering can exist in absence of a Scheduled Offence, since in the absence of Scheduled Offence, there is no crime and without crime, there is no tainted money, without which there is nothing to be laundered. Thus, since there are otherwise no allegations against the petitioner of having committed the predicate offence, he cannot be proceeded under the PMLA by the respondent.

7. The relevant provisions of the Prevention of Money Laundering Act, 2002 are as under:

(i) Section 2 (1) (U) defines "proceeds of crime" as under:

> "Proceeds of crime" means any property derived or obtained, directly or indirectly, by any person, as a result of criminal activity relating to a scheduled offence."

(ii) Section 3 defines the offence of "money-laundering" as under:

> "Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process of activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting or claiming it as untainted property shall be guilty of offence of money-laundering."

8. Thus, the proceeds of crime render essence and indispensable element of the offence of money laundering. Without existence of

proceeds of crime, there cannot be any commission of an offence of money laundering. The receipt of money or possession of foreign money would attract the contravention of Foreign Exchange Management Act, 1999 (in short “FEMA”) and the said contravention is not punishable under the FEMA. Even according to the case of the prosecution, the petitioner received a sum of Rs.2,50,86,018/-. The learned Senior Counsel also relied upon various judgments of the Hon'ble Supreme Court of India for consideration of bail applications in the economic offence. It held that, even if allegation is one of the grave offence, it is not a rule that bail should be denied in every case. The variety of cases that may arise from time to time that cannot be safely classified and it is dangerous to make an attempt to classify the cases. Further, the statements recorded under Section 50 of the PMLA are to be tested during trial, and are not credible evidence to deny bail.

9. Per contra, the learned Special Public Prosecutor appearing for the respondent would submit that during the investigation, it was revealed

that the petitioner incorporated M/s.Sajita Polymet Limited, having registered address at Hong Kong, maintaining bank account No.112526215838 with HSBC Bank, Queens Road Branch at Hong Kong. It is the recipient of the proceeds of crime. Further it was revealed that the petitioner company, carried International Trade Based Money-Laundering, at the instance of undisclosed beneficial owner and end-use, which caused depletion of foreign exchange reserves of the Republic of India.

10. The proceeds of crime since unaccounted tainted money had been sent from untraceable dummy entities accounts from India to Hong Kong in the guise of advance towards import but in actuality no exports were made to India from Hong Kong entities. The money was sent with the sole intention of siphoning the money out of the India. Further he would submit that the provisions under Section 45(1) of the PMLA amended in March 2018 had revived a twin condition and makes it tougher to get or grant bail. Under the amendment to Section 45(1) of the Act, the “scheduled offence” was replaced with “offences” under the

PMLA. The Hon'ble Division Bench of the Bombay High Court, in the case of ***Ajay Kumar Vs. Directorate of Enforcement reported in SCC online 196,*** concluded that the twin conditions under Section 45(1) of the PMLA, which were declared unconstitutional by the judgment of Hon'ble Supreme Court of India in the case of Nikesh Tarachand Shah, stand revived in view of legislative intervention vide Amendment Act, 13 of 2018. Therefore, the petitioner failed to satisfy this Court with regard to twin conditions contemplated under Section 45(1) of the PMLA. Hence, he prays for dismissal of the bail petition.

11. On a perusal of the materials available on records, it reveals that originally, the FIR was registered on 08.09.2017 as against M/s.Pajero Impex and 18 other entities and unknown public servants of Punjab National Bank and others, wherein the petitioner or his entity M/s.Sanjita Polymet Limited was not named as accused. The case has been registered alleging that the 19 entities had entered into criminal conspiracy with public servants of Punjab National Bank and abused their official position and were sending foreign exchange to Hong Kong

without genuine business transactions. The modus operandi was that the customers got remittances from various other banks to their accounts by way of RTGSs and presented their request with a quotation issued by foreign supplier for 100% advance remittances.

12. In this regard, during the period from January 2015 to May 2015, totalling to the tune of INR 424.58 Crores remittances were routed through Nostro account, maintained with HSBC, New York. After verification of the addresses of the account holders on the advice of the Concurrent Auditors, the bank found that none of the units were functioning in the available addresses. Thereby, there has been loss of foreign exchange to the tune of INR 424.58 Crores.

13. During the investigation, it was revealed that the petitioner, having registered office address at Hong Kong, maintaining account with HSBC Bank and the foreign exchange as advance was received by the said entity to the tune of INR 2,50,86,018/- in 4 tranches from India but corresponding exports to India were made. This proceeds of crime since

unaccounted tainted money had been sent from untraceable dummy entities accounts in India to Hong Kong.

14. The respondent has registered the case in the year 2017 and the petitioner was arrested and remanded to judicial custody on 13.06.2022. As rightly pointed out by the learned Senior Counsel for the petitioner that the proceeds of crime means any property derived or obtained, directly or indirectly, by any person, as a result of criminal activity relating to a scheduled offence." as defined under Section 2(1)(U) of the PMLA. The question is that, whether the petitioner had committed any scheduled offence or not. Without existence of proceeds of crime, there cannot be any commission of an offence of money laundering. Therefore, when there is no evidence to show that the petitioner has committed scheduled offence, then no offence made out under the PMLA by the petitioner.

15. It is relevant to extract the provisions under Section 4 of the Foreign Management Exchange Act, 1999 read as under:

"4. Holding of foreign exchange, etc. -- Save as otherwise provided in this Act, no person resident in India shall acquire, hold, own possess or transfer any foreign exchange, foreign security or any immovable property situated outside India."

16. Therefore, any contravention under Section 4 of the FEMA is liable to penalty upto thrice the sum involved in such contravention, where such amount is quantifiable or upto Rs.2 Lakhs, where the amount is not quantifiable. Further, the Court below, dismissing the bail petition observed that the petitioner has caused a loss of foreign exchange to the tune of INR 424.58 Crores, without any actual export. Whereas, even according to the case of the prosecution, a sum of Rs.2,50,86,018/- has been remitted to the account of the petitioner's company. Hence, the petitioner has satisfied the twin conditions contemplated under Section 45(1) of the PMLA.

17. In view of the above facts and also considering the period of incarceration suffered by the petitioner from 13.06.2022, this Court is

inclined to grant bail to the petitioner.

18. Accordingly, the petitioner shall deposit the immovable property stands in the name of the petitioner or in name of his friends or relatives, not less than worth of Rs.2,50,00,000/- (Rupees Two Crores and Fifty Lakhs Only) along with the valuation certificate obtained from the authority concerned and on such deposit,the petitioner is ordered to be released on bail on his executing a bond for a sum of Rs.10,000/- (Rupees ten thousand only) with two blood related sureties, each for a like sum to the satisfaction of the learned Principal Sessions Judge, Chennai and on further conditions that:

[a] the sureties shall affix their photographs and Left Thumb Impression in the surety bond and the Magistrate may obtain a copy of their Aadhar card or Bank pass Book to ensure their identity.

[b] the petitioner shall report before the respondent police daily at 10.30 a.m. and 5.30 p.m., for a period of six weeks and thereafter as and when required for interrogation.

G.K.ILANTHIRAIYAN, J.

Anu

[c] the petitioner shall not abscond either during investigation or

trial.

[d] the petitioner shall not tamper with evidence or witness either during investigation or trial.

[e] On breach of any of the aforesaid conditions, the learned Magistrate/Trial Court is entitled to take appropriate action against the petitioner in accordance with law as if the conditions have been imposed and the petitioner released on bail by the learned Magistrate/Trial Court himself as laid down by the Hon'ble Supreme Court in **P.K.Shaji vs. State of Kerala [(2005)AIR SCW 5560].**

[f] If the accused thereafter abscond, a fresh FIR can be registered under Section 229A IPC.

23.08.2022

Anu

Copy to:
1. The Principal Sessions Judge, Chennai.
2. The Assistant Director, Directorate of Enforcement,
   Ministry of Finance, Government of India, Chennai-I Zonal Office,
   2nd & 3rd Floors, C Block, Murugesa Naicker Office Complex,
   No.84, Greams Road, Thousand Lights, Chennai-600 00
3. The Superintendent,
   Central Prison, Puzhal.
4. The Public Prosecutor, Madras High Court.

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