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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **BAIL APPLN. 4225/2024, CRL.M.(BAIL) 1922/2024**

HARISH TIWARI

.....Applicant

Through: Mr. Madhav Khurana, Senior
Advocate with Mr. Prashant Pandey,
Mr. Sanjeevani, Ms. Akshita Chand
and Mr. Jaran Kumar, Advocates.

versus

**DIRECTORATE OF ENFORCEMENT, GOVERNMENT OF INDIA
THROUGH ITS ASSISTANT DIRECTOR**Respondent

Through: Mr. Arkaj Kumar, Counsel for ED.

CORAM:

HON'BLE MR. JUSTICE SANJEEV NARULA

ORDER

20.01.2025

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1. The present bail application has been filed under Section 439 of Code of Criminal Procedure, 1973¹ read with Section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023 and Section 45 of Prevention of Money Laundering Act, 2002² seeking regular bail in ECIR/DLZO-II/41/2021 dated 31st March, 2021³ emanating from FIR No. 495/2017⁴ under Sections 384, 389, 120-B, 34 of the Indian Penal Code, 1860⁵ registered at P.S. Punjabi Bagh.

¹ "CrPC"

² "PMLA"

³ "the impugned ECIR"

⁴ "the impugned FIR"

⁵ "IPC"



2. In brief, the case of the prosecution is as follows:

2.1. The investigation in the impugned ECIR stems from FIR No. 495/2017 filed against Mr. Harish Tiwari (the Applicant) and others based on a complaint lodged by Mr. Basu Dev Agrawal.

2.2. Following the investigation of the said FIR, Delhi Police filed a chargesheet on 21st December, 2017. Two supplementary chargesheets dated 12th March, 2018, and 16th February, 2021, were subsequently filed under Sections 384, 389, 411, 120B, and 34 of the IPC before the Tis Hazari Court, Delhi, naming the Applicant along with several others as accused.

2.3. The investigation under the FIR revealed a conspiracy where the accused persons, including the Applicant, allegedly extorted approximately INR 10 Crores from the Complainant over 12-13 years. The Applicant purportedly created fear in the Complainant's mind by threatening to implicate him in criminal cases and defame him using morphed photos and doctored videos. INR 5 Lakhs of the extorted amount was recovered during the Delhi Police's investigation.

2.4. Subsequently, the impugned ECIR was registered on 31st March, 2021. During investigation under PMLA, statements were recorded under Section 50 of PMLA, and a Provisional Attachment Order⁶ dated 15th February, 2023, was issued, provisionally attaching properties worth INR 10 Crores. This attachment was later confirmed by the Adjudicating Authority under PMLA through order dated 31st July, 2023.

2.5. The Applicant was arrested on 9th July, 2024, following searches

⁶ "PAO"



conducted at his premises. On the same day, the Special Court (PMLA), Tis Hazari, granted ED custody of the Applicant until 11th September, 2024. Since then, the Applicant has remained in judicial custody.

2.6. On 30th July, 2024, a Prosecution Complaint was filed before the Special Court (PMLA), naming the Applicant and three others. Cognizance of the said complaint was taken on 23rd September, 2024, and summons were issued to the accused persons.

2.7. Summons issued to certain accused persons remain unserved, and efforts are ongoing to gather the whereabouts of other absconding individuals in order to record their statements under Section 50 of PMLA. Statements from two co-accused persons were recorded under Section 50 of PMLA on 9th and 10th September, 2024, respectively.

3. In the above-noted background, Mr. Madhav Khurana, Senior Counsel for the Applicant advances the following in support of the Applicant's request for bail:

3.1. The investigation under the impugned ECIR has been concluded, and a complaint under Sections 44 and 45 of PMLA has been filed by the prosecution before the Special Court. This indicates that there is no further necessity for custodial interrogation, making the continued detention of the Applicant unwarranted.

3.2. The Applicant has been in custody since 9th July, 2024, and there is no likelihood of the trial for the scheduled offence concluding in the near future. The protracted trial timeline infringes upon the Applicant's right to a speedy trial under Article 21 of the Constitution of India, 1950. Furthermore, the Applicant's conduct during prior bail and interim bail



periods demonstrates that he is neither a flight risk nor likely to interfere with the ongoing trial.

3.3. On merits, he argues that the ECIR under the PMLA was registered on 31st March, 2021, pertaining to a predicate offence under the present FIR for which chargesheets were filed as early as 21st December, 2017, 12th March, 2018, and 16th February, 2021. Despite the case being under investigation since 2021, the Applicant was arrested on 9th July, 2024, nearly 3 years after the registration of the ECIR, without any additional incriminating evidence emerging during this period.

3.4. Significantly, in the predicate offence, title documents of the Applicant's properties were seized by the police but were later released through a detailed order dated 8th March, 2021, passed by the Trial Court. The said order, after being challenged through Criminal Revision Petition No. 53/2021, was upheld by the Additional Sessions Judge, Tis Hazari Court, on 27th September, 2021. The Revisional Court made the following observations:

"18. Coming to the facts of the present case. Record shows that trial court perused the entire record as well as the testimony of material witnesses and it came to the conclusion that prosecution has failed to produce any evidence to demonstrate that the properties, whose title documents were seized, were procured from the alleged extorted money. This finding that there was no nexus between the acquisition of the properties and the alleged documents goes to the root of the matter. This goes on to show that the seizure of the title documents made by the Investigating Officer was bad in law. On perusing the trial court record including the charge-sheet and the testimony of witnesses, I fail to find any fault in the finding and the line of reasoning given by the trial court.

19. The argument of Applicant that the seizure of the title documents was valid merely because the respondent failed to demonstrate his capacity to buy these properties has no merit. In criminal law, the burden of proof



always remains on the prosecution. In case, the argument of the counsel is accepted then it would amount to reversing the basic principle of criminal law, which is not permissible. It would be totally unjustified and absurd to assume that the investigating officer can first seize the property of an individual and then justify the seizure on the ground that the person has failed to account for the seized property. The condition precedent for exercising the discretion under Section 102 Cr.P.C is that there must be suspicion in the mind of the police officer or the property may be found under circumstances which create suspicion of commission of an offence. In case, property has been seized in the absence of these circumstances then the seizure is definitely bad in law.”

3.5. The Respondent has failed to substantiate its claim that the funds credited to the Applicant’s account constitute proceeds of crime. The Applicant had provided a list of clients and other records to verify the legitimacy of the funds. However, the Department has not conducted a thorough investigation into these sources and instead arrived at an unsubstantiated conclusion that the attached properties were acquired through the “direct proceeds of crime.”

3.6. The Applicant has no criminal antecedents and undertakes to abide by the conditions imposed by this Court, if bail were to be granted.

4. *Per contra*, Mr. Arkaj Kumar, counsel for the Respondent, strongly opposes the Applicant’s request for bail. He submits that the offence under PMLA is a standalone offence and the statements of the accused persons recorded under Section 50 of PMLA stands corroborated by the other evidence on record which clearly disclosed the commission of offence under Section 3 and 4 of PMLA by the Applicant. He further submits that although Prosecution Complaint has been filed before the Special Court, nonetheless, the investigation is still ongoing and a supplementary complaint would be filed in due course. Furthermore, he urges that the Adjudicating Authority



has confirmed the PAO No. 02/2023 dated 15th February, 2023, and appeal against the said order has been dismissed for non-prosecution. Additionally, two co-accused persons have been declared as absconder under Section 82 of CrPC by the Metropolitan Magistrate, Tis Hazari Court through orders dated 12th December, 2017 and 26th March, 2018, respectively.

5. The Court has considered the facts of the case and the afore-noted contentions. In the present case, the Applicant has been in custody since 9th July, 2024. It is undisputed that a Prosecution Complaint under the PMLA, has already been filed, indicating that the primary investigation concerning the Applicant is complete. Furthermore, this Court has granted bail to the Applicant in FIR No. 495/2017, which pertains to the scheduled offences forming the basis for the PMLA proceedings. The relevant observations of the Court are as follows:

“49. After having brought to the knowledge that the applicant was hospitalised, the learned Trial Court, in my opinion, was not correct in issuing a non-bailable warrant without getting the same verified. The said aspect of not surrendering on the said date, therefore, cannot be construed as the situation contemplated under Section 436(2) of the Cr.P.C. in which Court may refuse to release the applicant on bail in a bailable offence. The applicant’s inability to surrender on 27.11.2021, on account of being admitted in the hospital, in the absence of any verification pointing out otherwise, cannot be termed as a failure to comply with the conditions of the bail bond as regards the time and place of attendance.

50. The other aspect which has been vehemently contended on behalf of learned Counsel for the respondent is that the applicant, while on interim bail, had threatened the driver of the complainant. This, in my opinion, is not a ground of such nature that would disentitle the applicant from being released on bail in a bailable offence. This is for more than one reason. Firstly, even though the DD entry was made with regard to the said allegation in the year 2008, no action has been taken till date even though more than four years have elapsed. Secondly, the said driver / witness is stated to have already been examined way back in February,



2018.

51. *The other important aspect which cannot be brushed aside is that, despite the period of more than five years having been elapsed, only 28 out of 70 witnesses have been examined. It is not a case of the State that the trial was delayed due to the dilatory tactics of the applicant. The Supreme Court, while dismissing the SLP against the order dated 13.10.2022, had categorically observed that the applicant would be entitled to revive his application for bail in case the trial does not get over within the period of six months from the date.*

52. *In view of the above, I am of the opinion that the applicant is entitled to be released on bail in terms of provisions of Section 436 read with Section 436A of the Cr.P.C. The applicant has been charged with Section 384 of the IPC which provides for the maximum punishment of imprisonment upto three years and the applicant has already undergone more than three years of incarceration. Thus, in relation to Section 384 of the IPC, the applicant is entitled to the benefit of Section 436A of the Cr.P.C. The other section, the applicant is charged with, is Section 389 of the IPC. The same is a bailable offence and in view of the facts and the law as discussed above, the applicant is entitled to be released on bail."*

6. Since we are dealing with offences under Sections 3 and 4 of PMLA, the stringent twin conditions prescribed under Section 45 of PMLA, are attracted. Thus, the Court must be satisfied that there are reasonable grounds to believe that the accused is not guilty of the alleged offence and that they are not likely to commit any offence while on bail. However, it must also be noted that while the twin conditions under Section 45 of PMLA impose significant restrictions on the grant of bail to the accused, they do not constitute an absolute bar to granting bail. The discretion to grant bail lies with the Court, which must exercise this power judiciously and not arbitrarily or irrationally. The decision is guided by the legal principles



outlined in Section 45 of PMLA.⁷

Absence of Corroborative Evidence

7. In *Vijay Madanlal Choudhary v. Union of India and Others*,⁸ the Supreme Court clarified that while considering a bail application under PMLA, the Court is not required to conduct an in-depth analysis of the merits of the case. Instead, the Court must form its view based on the material available on record. It was emphasized that the Court's assessment should rely on probabilities drawn from the reasonable material collected during the investigation. The phrase “reasonable grounds for believing,” as used in Section 45 of PMLA, indicates that the Court’s role is to determine whether there is a genuine case against the accused. The prosecution is not required to establish the charge beyond a reasonable doubt at the bail stage.

8. A foundational element that must be established by ED is the existence of “proceeds of crime” and the involvement of the Applicant in any process or activity connected thereto. In *Arvind Kejriwal v. Directorate of Enforcement*,⁹ the Supreme Court observed that the burden of proof lies on the prosecution to establish three foundational facts – the scheduled offence has been committed, the property in question has been derived or obtained directly or indirectly from the criminal activity and the accused is directly or indirectly involved in any process connected with the said property being proceeds of crime. It is only after these facts are established that the accused can rebut the presumption by producing evidence or material to disprove their involvement. The relevant observations are

⁷ *Vijay Madanlal Choudhary and Others v. Union of India and Others*, (2022) SCC OnLine SC 929

⁸ (2022) SCC OnLine SC 929



reproduced below:

*“46. Two more legal aspects need to be addressed. Section 45 of the PML Act does not stipulate the stage when the accused may move an application for bail. A bail application can be submitted at any stage, either before or after the complaint is filed. Whether the charge is framed or evidence is recorded or not recorded, is immaterial. Clearly, the fact that the prosecution complaint has not been filed, the charge has not been framed, or evidence is either not recorded or partly recorded, will not prevent the court from examining the application for bail within the parameters of Section 45 of the PML Act. As the issue would relate to grant or denial of bail, the parameters or the stipulation in State of Orissa v. Debendra Nath Padhi,⁴² which states that evidence or material not relied by the prosecution cannot be examined at the stage of charge, will not apply. The reason is simple and straightforward. Right to bail under Section 45 of the PML Act is not dependant on the stage of the proceedings. The power of the court under Section 45 is unrestricted with reference to the stage of the proceedings. All material and evidence that can be led in the trial and admissible, whether relied on by the prosecution or not, and can be examined.⁴³ On the question of burden of proof, Section 24 of the PML Act can be relied on by the prosecution. However, at the same time, the observations of this Court in Vijay Madanlal Choudhary (supra) with reference to clauses (a) and (b) of Section 24, as well as the burden of proof placed on the prosecution to the extent indicated in paragraph 57 refer to at least three foundational facts. These foundational facts are - criminal activity relating to the scheduled offence has been committed; property in question has been derived or obtained directly or indirectly by any person as a result of that criminal activity; and the person concerned is directly or indirectly involved in any process or activity connected with the said property being proceeds of crime, have to be established. It is only on establishing the three facts that the offence of money laundering is committed. **When the foundational facts of Section 24 are met, a legal presumption would arise that the proceeds of crime are involved in money laundering. The person concerned who has no causal connection with such proceeds of crime can disprove their involvement in the process or activity connected therewith by producing evidence or material in that regard. In that event, the legal presumption would be rebutted.**”*

[Emphasis Supplied]

9. In light of the test delineated above, this Court is of the *prima facie*

⁹ 2024 SCC OnLine SC 1703



opinion that there is not sufficient material on record to conclude that the ED has established a nexus of the Applicant with the alleged “direct proceeds of crime”. The allegations of extortion of INR 10 Crores which constitutes as the proceeds of crime is strongly disputed. The Complainant alleges that this substantial amount was paid entirely in cash under coercion and threats of extortion over a period of 12-13 years. However, it is pertinent to note that the primary evidence relied upon by the ED to establish these payments are only the statement recorded under Section 50 of PMLA. While such a statement may be admissible, its evidentiary weight must be assessed in conjunction with other material on record. The statement remains unsupported by any independent or corroborative evidence. There is no documentary proof, such as bank records, transaction receipts or third-party corroboration, to substantiate the alleged cash payments of 10 Crores, the alleged extortion money.

10. The absence of corroborative evidence raises serious doubts about the probative value of the Complainant’s statement. As observed above, at the stage of considering bail, the Court is limited to making a *prima facie* assessment of the material on record. Judicial precedents have consistently held that while a statement under Section 50 of PMLA is admissible, it cannot serve as the sole basis for establishing culpability without corroboration, especially in cases involving grave allegations.¹⁰ These issues, by their nature, are factual and require detailed scrutiny during trial, where the parties will have the opportunity to present evidence, cross-

¹⁰See also: *Prem Prakash v. Union of India*, (2024) 9 SCC 787



examine witnesses and address evidentiary inconsistencies.¹¹

11. Further, it must also be observed that ED alleges that the Applicant has acquired significant movable and immovable assets using proceeds of crime and is currently in possession of such properties. It is claimed that during his examination, the Applicant was unable to provide a satisfactory explanation regarding the source of income or funds used for these acquisitions. They also point out that the Applicant has alleged that the cash receipts represented his legal and consultancy fees but could only produce 4 invoices amounting to INR 16.5 Lakhs. On a *prima facie* assessment, these allegations might raise concerns regarding the Applicant's assets appearing disproportionate to his disclosed income. Such discrepancies could attract scrutiny under the Income Tax Act, 1961, however, these allegations do not adequately substantiate the specific claim of extortion of INR 10 Crores made by the Complainant, which forms the crux of the proceeds of crime alleged under PMLA. The Respondent must establish a clear nexus between the proceeds of crime and the Applicant's acquisitions. Therefore, while the allegations regarding the Applicant's assets may merit investigation, they do not, at this stage, meet the threshold required under Section 45 of PMLA to displace the Applicant's right to bail. Considering the aforementioned facts and the absence of *prima facie* material linking the Applicant's assets to the alleged proceeds of crime, the Court finds that the Applicant satisfies the first condition under Section 45 of PMLA.

Criminal Antecedents

¹¹ See also: *Chandra Prakash Khandelwal v. Directorate of Enforcement*, 2023 SCC OnLine Del 1094



12. As per the second condition of Section 45, it is imperative for the Court to be satisfied that the Applicant is not likely to commit an offence while on bail. This condition serves as a critical safeguard to ensure that granting bail does not result in any potential risk to public safety or impede the administration of justice.

13. In the instant case, the Applicant has no criminal antecedents and has undertaken to not make any direct or indirect inducement, threat or promise to any person acquainted with the facts of the case.

14. Thus, in light of the lack of corroborative evidence and the clean antecedents of the Applicant, the twin conditions prescribed under Section 45 of PMLA stands satisfied.

Rigours of Section 45 vis-à-vis Personal Liberty

15. It is well-settled that while Section 45 of PMLA restricts the right of the accused to grant of bail, it cannot be said that the conditions provided under Section 45 impose absolute restraint on the grant of bail.¹²

16. In *Manish Sisodia v. Directorate of Enforcement*,¹³ the Supreme Court highlighted the necessity of harmonizing these statutory rigours with constitutional principles, particularly the right to a speedy trial and personal liberty. The Supreme Court observed that while Section 45 prescribes specific conditions for granting bail, these conditions cannot override the fundamental rights of an accused. It has been emphasized that prolonged incarceration, coupled with significant delays in trial, requires courts to re-

¹² *Vijay Madanlal Choudhary and Ors. v. Union of India and Ors.*, (2022) SCC OnLine SC 929

¹³ 2024 SCC OnLine SC 1920



evaluate the denial of bail, especially where such delays are not attributable to the accused. To this effect, the decision reads as under:

“37. Insofar as the contention of the learned ASG that since the conditions as provided under Section 45 of the PMLA are not satisfied, the appellant is not entitled to grant of bail is concerned, it will be apposite to refer to the first order of this Court. No doubt that this Court in its first order in paragraph 25, after recapitulating in paragraph 24 as to what was stated in the charge-sheet filed by the CBI against the appellant, observed that, in view of the aforesaid discussion, the Court was not inclined to accept the prayer for grant of bail at that stage. However, certain paragraphs of the said order cannot be read in isolation from the other paragraphs. The order will have to be read in its entirety. In paragraph 28 of the said order, this Court observed that the right to bail in cases of delay, coupled with incarceration for a long period, depending on the nature of the allegations, should be read into Section 439 Cr.P.C. and Section 45 of the PMLA. The Court held that the constitutional mandate is the higher law, and it is the basic right of the person charged of an offence and not convicted that he be ensured and given a speedy trial. It further observed that when the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, would be guided to exercise the power to grant bail. The Court specifically observed that this would be true where the trial would take years. It could thus clearly be seen that this Court, in the first round of litigation between the parties, has specifically observed that in case of delay coupled with incarceration for a long period and depending on the nature of the allegations, the right to bail will have to be read into Section 45 of PMLA.

39. In the light of the specific observations of this Court in paragraph 28 of the first order, we are not inclined to accept the submission of the learned ASG that the provisions of Section 45 of the PMLA would come in the way of consideration of the application of the appellant for grant of bail.”

17. While it is true that the period of incarceration in the present case has not been exceptionally long, the fact remains that the investigation against the Applicant is complete and the Prosecution Complaint has already been filed before the competent Court. Further, it must also be noted that the Applicant was arrested for the scheduled offence on 23rd October, 2017.



Subsequently, this Court granted regular bail to the Applicant under the scheduled offence through order dated 14th July, 2023. During this period, the Applicant has been released on interim bail on multiple occasions. The period spent in custody for the scheduled offence cannot be considered as period spent for the offence under PMLA, nonetheless, it cannot be controverted that Applicant was already in custody for a period of more than 3 years for the scheduled office.

18. There is nothing to suggest that the Applicant's release on bail would adversely affect the ongoing proceedings or pose a risk of tampering with evidence or influencing witnesses. Considering the facts and circumstances discussed above, it is directed that the Applicant be released on bail on furnishing a personal bond for a sum of INR 5,00,000/- with two sureties of the like amount, subject to the satisfaction of the Trial Court, on the following conditions:

- a. The Applicant shall cooperate in any further investigation as and when directed by the concerned IO;
- b. The Applicant shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or tamper with the evidence of the case, in any manner whatsoever;
- c. The Applicant shall under no circumstance leave the country without the permission of the Trial Court;
- d. The Applicant shall appear before the Trial Court as and when directed;



e. The Applicant shall provide the address where he would be residing after his release and shall not change the address without informing the concerned IO/ SHO;

f. The Applicant shall, upon his release, give his mobile number to the concerned IO/SHO and shall keep his mobile phone switched on at all times.

19. In the event of there being any FIR/DD entry / complaint lodged against the Applicant, it would be open to the State to seek redressal by filing an application seeking cancellation of bail.

20. It is clarified that any observations made in the present order are for the purpose of deciding the present bail application and should not influence the outcome of the trial and also not be taken as an expression of opinion on the merits of the case.

21. The bail application is allowed in the afore-mentioned terms.

SANJEEV NARULA, J

JANUARY 20, 2025

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