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MCRC-44309-2024

IN THE HIGH COURT OF MADHYA PRADESH
AT INDORE

BEFORE

HON'BLE SHRI JUSTICE PRAKASH CHANDRA GUPTA

ON THE 19th OF NOVEMBER, 2024MISC. CRIMINAL CASE No. 44309 of 2024*MR. ASIF HANIF THARA**Versus**ENFORCEMENT DIRECTORATE*

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Appearance:

Shri Sidhharth Agrawal, learned Senior Advocate with Shri Manu Maheshwari, Ms. Smriti Sinha, Ms. Radhika Subhash, Ms. Arshiya Ghose and Shri Ritesh Kumar Sharma - Advocates for the applicant.

Shri Himanshu Joshi, learned Deputy Solicitor General and Shri Dilip Singh Shaktawat, Asst. Directorate for respondent Enforcement Department.

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Reserved on 11.11.2024

Pronounced on 19.11.2024

ORDER

Heard with the aid of case diary.

This is first bail application filed under Section 439 of Cr.P.C. (now section 483 of the Bharatiya Nagarik Suraksha Sanhita, 2023) read with Section 45 of PMLA for grant of bail to the applicant, in connection with FIR/No.ECIR NO.ECIR/STF/15/2023 registered at Enforcement Directorate S.T.F. HQ., New Delhi for commission of offence punishable under sections 3/4 of the Prevention of Money Laundering Act, 2002.



2. As per prosecution case, an FIR bearing crime no.421/2023 dated 16.06.2023 was registered at P.S.- Morar, District- Gwalior (M.P.) against the applicant Asif Hanif Thara and co-accused persons namely Hanif Kadir, Putta Swamy, S. Murthy, Noor Ahmad, Shankar, Lokesh A, Irfan Pasha, Ali Mulla Sarif, Kiran Kumar, Amjad Khan and ors., as alleged who are proprietors of 9 Benami Firms, u/s 417, 420 and 120-B of the IPC at the instance of Assistant Enforcement Officer, Enforcement Directorate S.T.F. Branch, Government of India, New Delhi (hereinafter referred as ED). In the said FIR, it was alleged that during period 16.07.2014 to 16.06.2023 the applicant fraudulently obtained import authorization in the name of his Benami entities by cheating the Government authorities with an intent to acquire wrongful gain for himself by circumventing the existing guideline issued by Department of Revenue, Ministry of Finance and obtained maximum share of country quota by misleading the authority and concealing the fact from them and causing wrongful loss to government exchequer. Sections 417, 420 and 120 B of the IPC as mentioned in the aforesaid FIR are scheduled offences under the Prevention of Money Laundering Act, 2002 (hereinafter referred as PMLA) accordingly, the ECIR bearing no. ECIR/STF/15/2023 dated 02/11/2023 was recorded for investigation under the PMLA.

3. During PMLA investigation it was revealed that the applicant is involved in importing poppy seeds from China and Turkey by misrepresenting/ hiding the facts and circumventing the stipulated guidelines



issued by competent authority in the name of aforesaid 9 Benami firms situated around the same place. He has been obtaining import authorisation from Central Bureau of Narcotics, Gwalior in a fraudulent manner in a different proprietorship and firms set up in the name of his family members and employees/ co-accused persons but beneficiary owned and controlled by him in gross violation of the licensing provision for import of the poppy seeds as stipulated by the Department of Revenue, Ministry of Finance and Government of India. It was also revealed that the applicant is the master mind behind the entire scheme of obtaining import licence of poppy seeds. He played an active role in getting up various proprietorship firms in the name of his family members and employees/ co-accused persons with malafide intention to receive maximum share in the import of poppy seeds which is capped at a specific quantity per country. He managed and controlled the operation of aforesaid 9 proprietorship firms including their bank accounts. The applicant fraudulently imported poppy seeds worth Rs. 141.8 Crores which is nothing but proceeds of crime involved in the offence of money laundering. The applicant used to import the poppy seeds from distinct countries and sell it to the domestic buyers within the country. Therefore, it is clear that the applicant is directly indulged into the activities connected with the proceeds of crime in terms of section 3 of the PMLA.

4. Learned counsel appearing for the applicant/ accused submits that, mandatory provision of PMLA is not followed by the ED. It is submitted that there is non-compliance of section 19 of the PMLA. Reasons were not recorded by the prosecution for the arrest of the applicant and reasons which



are recorded are based on statement of co-accused persons which is not admissible in evidence. It is further submitted that section 50 of the PMLA was also not complied with. No evidence and material was collected by the ED. Reliance was placed only on the statement of co-accused persons. No information was collected from licensing authority which issued the license in favour of the applicant. Tainted property or money has not been specified by the ED. While the ED ought to have collected the material as per the procedure prescribed u/s 50 of the Act and thereafter has to reach satisfaction on reasonable ground and belief regarding guilt of the applicant, the same has not been done and therefore, arrest is illegal and not warranted. It is also submitted that crime no.421/2023 offence punishable under sections 417, 420 and 120 B of IPC has been lodged against the applicant and others on 16.06.2023 at P.S.- Morar, Gwalior at the instance of ED but till date no chargesheet has been filed by the police nor has the applicant ever been called to join the investigation. No document or information has also ever been sought from the applicant. After lodging of the aforesaid ECIR and till arrest of the applicant in the instant case i.e. 03.10.2024 the investigating authorities had neither summoned the applicant nor recorded his statement and there was no investigation to outreach whatsoever to him despite of the same the ED arrested the applicant. On 04.10.2024, the applicant was produced before the remand court and he was remanded to judicial custody. There was no requirement expressed by ED for taking him into its custody at the relevant time. It is further submitted that twin condition under section 45 will be attracted only when mandatory provision under sections 19 and 50 of



the PMLA has been complied with. In order to comply with the aforesaid mandatory provision, twin condition mentioned under section 45 will not apply. The applicant has carried out his business upon a valid licence and it has not been alleged by the ED that any evasion of tax is carried out by the applicant. It is also submitted that when the applicant was in judicial custody, the ED had recorded statement of applicant on 27.10.2024 and 28.10.2024 which is not admissible in evidence. In these circumstances it is prayed that the applicant be released on bail.

5. Learned counsel for the applicant placed reliance in the case of *Prem Prakash Vs. Union of India [2024 SCC Online SC 2270]*, *Pankaj Bansal Vs. Union of India And Ors. [2023 SCC Online SC 1244]*, *Pushpendra Singh Vs. Directorate of Enforcement [MCRC 19929/ 2024 MPHC order dated 08.07.2024]* and *Arvind Kejriwal Vs. Directorate of Enforcement [2024 SCC Online SC 1703]*.

6. On other hand learned counsel appearing for the ED/ non-applicant has filed a detailed reply against application for grant of bail. It is submitted that the mandatory conditions as mentioned under section 45 of the PMLA is to be satisfied before an accused is released on bail, unless court comes to satisfaction that there is no reasonable ground that the applicant/ accused is guilty and he is not likely to commit any offence, only then he may be released. It is submitted that sufficient evidence has been collected that shows that the applicant is involved in money laundering which is proceeds of the crime. Therefore, the applicant is not entitled for bail. However, it is



fairly submitted that the applicant was neither called by ED nor his statement was recorded before arresting him. It is further fairly submitted that the conclusion of guilt of the applicant arrived upon by the ED is based upon the statement of co-accused persons/ suspected persons and statement of other witnesses has neither been recorded nor any information has been called from the licencing authority of the applicant. It is also fairly submitted that no further custodial interrogation of the applicant is required.

7. I have heard learned counsel for the parties and perused the records.

8. In the case of *Pushpendra Singh (Supra)* the coordinate bench of this court opined as under:-

“10. Now, it is to be seen that if Section 19 of the PMLA, 2002 has not been complied with, then whether Court can grant bail without satisfying itself on twin conditions mentioned in Section 45 of PMLA, 2002. Due to non-compliance of Section 19 of the Act, whether rigors of Section 45 of the PMLA, 2002 will be wiped out. Arresting Officer has to asses the material available in charge-sheet of predicate offence and also unearthed during enquiry and investigation by authorized officer. Such officer must have material on basis of which he forms opinion that accused is guilty of offence under the Act only then discretion, vested in him to arrest, is to be exercised. After arrest in bail application, Court will examine the material and reasons given by authorized officer if accused is not guilty of offence under PMLA, 2002. Authorized officer has to give reasons of belief of guilt and Court has to give reasons of belief of not guilty of offence to exercise



power of grant of bail. Reason to believe is sin qua non for exercising power under Section 19 by authorized officer & under Section 45 by the Court. Accused will also have proper opportunity, if reason of belief are in writing and clearly spelt out in arrest order. There is a thread running between Section 19 & Section 45 of PMLA, 2002. Rights of liberty of a person may be jeopardized, if reason of belief of guilt under Act is not in writing in arrest order, as condition for grant of bail is rigorous under PMLA, 2002. In such conditions, Court while considering the bail application has to see that arrest has been made by complying with provisions of Section 19 of the Act. In this case, provisions of Section 19 of the Act has not been complied with. Total sum, which is said to have been diverted is Rs.10.93 Crores according to the report of CBI though allegations were made in respect of about Rs.14,93,67,500/-. Enforcement Department is making allegation in respect of Rs.4377.94 Lacs. Search has been conducted. In complaint, it has been mentioned that there is non-cooperation by applicant and he tried to hide facts, therefore, he was arrested under Section 19 of the PMLA, 2002 but reason of belief of guilt under the Act for arrest is not stated in complaint nor in arrest order. Assets and properties of applicant have been seized by authorized officer. Applicant is in jail and his custodial investigation may not be required. No application has been filed by investigating agency for further interrogation of applicant in custody of Court and nothing is brought on record to support apprehensions that applicant is likely to commit any offence in future, if he is released on bail.”

9. In the case of *Prem Prakash (Supra)* the Apex Court opined as



under:-

“32. We have no hesitation in holding that when an accused is in custody under PMLA irrespective of the case for which he is under custody, any statement under Section 50 PMLA to the same Investigating Agency is inadmissible against the maker. The reason being that the person in custody pursuant to the proceeding investigated by the same Investigating Agency is not a person who can be considered as one operating with a free mind. It will be extremely unsafe to render such statements admissible against the maker, as such a course of action would be contrary to all canons of fair play and justice.

*“37. Being a co-accused with the appellant, his statement against the appellant assuming there is anything incriminating against the present appellant will not have the character of substantive evidence. The prosecution cannot start with such a statement to establish its case. We hold that, in such a situation, the law laid down under Section 30 of the Evidence Act by this Court while dealing with the confession of the co-accused will continue to apply. In *Kashmira Singh v. State of Madhya Pradesh*, (1952) 1 SCC 275 : 1952 SCR 526, this Court neatly summarized the principle as under:—*

“.... The proper way to approach a case of this kind is, first, to marshal the evidence against the accused excluding the confession altogether from consideration and see whether, if it is believed, a conviction could safely be based on it. If it is capable of belief independently of the confession, then of course it is not necessary to call the confession in aid. But cases may arise where the judge is not prepared to act on the other evidence as it stands even though, if believed, it would be sufficient to sustain a conviction.



In such an event the judge may call in aid the confession and use it to lend assurance to the other evidence and thus fortify himself in believing what without the aid of the confession he would not be prepared to accept.”

Hence, insofar as Afshar Ali's statement is concerned, the Investigating Agency will have to first marshal the other evidence and can at best look at the statement for lending assurance.

Independently, the statement of Afshar Ali does not prima facie indicate anything about the role of the appellant in the forgery of sale deed and other documents or being involved in the offence of money laundering.”

10. In the case of *Pankaj Bansal (Supra)* the Apex Court opined as under:-

*"27. Further, when the second ECIR was recorded on 13-6-2023 "after preliminary investigations", as stated in ED's replies, it is not clear as to when ED's Investigating Officer had the time to properly inquire into the matter so as to form a clear opinion about the appellants' involvement in an offence under the Act of 2002, warranting their arrest within 24 hours. This is a sine qua non in terms of Section 19(1) of the Act of 2002. Needless to state, authorities must act within the four corners of the statute, as pointed out by this Court in *Devinder Singh v. State of Punjab*, and a statutory authority is bound by the procedure laid down in the statute and must act within the four corners thereof."*

11. The Apex court while considering admissible evidence in the case of *Arvind Kejriwal (Supra)* opined as under:-



“41. DoE has drawn our attention to the use of the expression ‘material in possession’ in Section 19(1) of the PML Act instead of ‘evidence in possession’. Though etymologically correct, this argument overlooks the requirement that the designated officer should and must, based on the material, reach and form an opinion that the arrestee is guilty of the offence under the PML Act. Guilt can only be established on admissible evidence to be led before the court, and cannot be based on inadmissible evidence. While there is an element of hypothesis, as oral evidence has not been led and the documents are to be proven, the decision to arrest should be rational, fair and as per law. Power to arrest under Section 19(1) is not for the purpose of investigation. Arrest can and should wait, and the power in terms of Section 19(1) of the PML Act can be exercised only when the material with the designated officer enables them to form an opinion, by recording reasons in writing that the arrestee is guilty.”

12. After considering the judgments referred above, it is apparent that in case of non-compliance of section 19 of the PMLA, the court shall examine the material and resources whereby the authorized officer has to give reason to belief the guilt of accused and the court has to give reason to belief of not guilty of offence i.e. reason to belief becomes a *sine-qua-non*. It is also clear that when an accused is in custody under PMLA irrespective of the case for which he is under custody, any statement under section 50 of PMLA to the same investigating agency is inadmissible against the maker. Furthermore, the arrest should be rational, fair and as per law and shall not be merely based upon guilt of accused established from inadmissible



evidence. Additionally, forming of opinion of the designated officer of the guilt of accused in writing is must.

13. In the instant case before the arrest of the applicant, he was neither summoned, nor his statement was recorded by the investigating authorities. As alleged, the applicant carried out his import business under valid license. No information was called by ED from the licensing authority to show that the applicant adopted fraudulent practices in obtaining import license. Opinion formed by the ED u/s 19 of the PMLA with respect to the guilt of the applicant, is based upon the statement of the co-accused person which is *prima facie* inadmissible. Therefore, it appears that in this case provisions of section 19 of the PMLA has not been complied with. In the case of *V. Senthil Balaji V State Represented by Deputy Director and Ors. [(2024) 3 SCC 51]* in paragraph 97.2, it has been held that in any non-compliance of the mandate under section 19 of the PMLA, the same would enure to benefit of the person arrested. It also appears that as submitted by the learned counsel for the ED, no further custodial interrogation is required.

14. Considering the aforesaid facts and circumstances of the case, in view of this court it is a fit case to grant bail to the applicant. Hence, without expressing any opinion on merit of the case, this application is **allowed**.

15. It is directed that the applicant- **MR. ASIF HANIF THARA** be released on bail upon his furnishing personal bond in the sum of **Rs.5,00,000/- (Rupees Five Lakhs only)** with two sureties in the like amount to the satisfaction of the concerned trial Court for his appearance before the



trial Court on all such dates as may be fixed in this behalf by the trial Court during pendency of the trial. It is further directed that applicant shall comply with the provisions of Section 480 (3) of Bharatiya Nagarik Suraksha Sanhita, 2023 :-

"(a) The applicant shall attend in accordance with the conditions of the bond executed under this Chapter;

(b) He shall cooperate in investigation as and when required by investigating officer.

(c) He shall not commit an offence similar to the offence of which he is accused, or suspected, of the commission of which he is suspected; and

(d) He shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer or tamper with the evidence, and may also impose, in the interests of justice, such other conditions as it considers necessary and additionally.

(e) The applicant shall not leave Bharat without prior permission of the trial court. He will surrender his passport, (if any), before the trial court within 7 days from his release."

16. M.Cr.C. stands disposed of, accordingly.

C.c. as per rules.

(PRAKASH CHANDRA GUPTA)
JUDGE