

IN THE HIGH COURT OF BOMBAY AT GOA**LD-VC-BA-55-2020**

Sunil Kumar

.... Applicant

Versus

Asst. Director,
Enforcement Directorate,
Panaji Zonal Office & Anr.

.... Respondents

Shri A.D. Bhobe, Advocate for the Applicant.

Shri S. Samant, Special Public Prosecutor for Respondent No.1.

Shri Gaurish Nagvenkar, Additional Public Prosecutor for the Respondent No.2.

Coram: DAMA SESHADRI NAIDU, J.**Reserved on : 16 December 2020****Pronounced on : 21 December 2020****ORAL ORDER:****Facts:**

The applicant is an accused in ECIR No.1/2020, registered by the Enforcement Directorate at Goa. The offence attracts the Prevention of Money Laundering Act, 2020 ('PML Act' for short).

(a) The Predicate Offences:

2. The allegations as to the predicate offences, in brief, are these. Certain foreign nationals filed four criminal complaints against the applicant, his son, wife, and daughter; that is, the whole family. Those FIRs are (i) 71/2017, dated 09.09.2017; (ii) 86/2017, dated 19.09.2017; (iii) 96/2017, dated 09.11.2017. and (iv) 13/2018, dated 23.03.2018. Besides those FIRs, the Economic Offences Cell, being a State organ, also got a crime registered in FIR No.5/2020, dated 21.08.2020.

3. In all these predicate offences, the applicant secured anticipatory bail. In Crime No.5/2020, registered by the Economic Offences Cell, the applicant invoked Section 482 of CrPC and came to this Court. This

Court, though allowed the Investigating Agency to go ahead, has restrained them from taking any coercive steps against the applicant.

4. As a matter of record, in Crime No.71/2017, Quepem Police have filed the chargesheet. In the other three offences, the police filed final reports, that is 'A Summary Reports. Later, indisputably, given the other developments, the police withdrew their A Summary Reports with the trial Court's permission. Now, those three crimes stand transferred to the Economic Offences Cell, where they are pending investigation.

5. As a matter of additional information, I may briefly touch on what happened in 2016: the same set of complainants in that year, too, complained to the Quepem Police station about the alleged fraud or cheating perpetrated by the applicant and his family. But the police closed those complaints on the premise that the complainants, mostly Russian Nationals, gave the complaints the day before they left the country. And the police had no occasion to investigate the crime. That apart, they also felt that the complaints only raised a civil dispute. Once again, the complainants came back to India in 2017, when these predicate offences were registered.

(b) The Offence Under the PML Act:

6. Indeed, the predicate offences pending, the respondent, that is the Enforcement Directorate at Goa (the "ED"), registered ECIR No.1/2020 against the applicant and the other members of his family. First, the ED arrested the first accused, that is the applicant's son, and custodially interrogated him for 45 days. Later, he was released on bail. As part of the investigation, when the ED questioned the applicant's wife and daughter, the other accused, they reported that they had no knowledge about the business transactions, much less about the alleged crime. According to them, the first accused Ankit Kumar had been instrumental in conducting the business, and they only lent their names.

7. In the same vein, the ED wanted to inquire with the applicant. For that purpose, they issued notices under section 50 (2) and (3) of the PMLA. But as the ED maintains, the applicant did not respond, despite his receiving notices on seven occasions.

8. But as the record reveals, the applicant first responded to the ED notice in March 2020, informing them that he appointed his son, the first accused, his agent; and he would answer all their queries. But the ED persisted with their demand that the applicant should attend the investigation. So they went on serving notices. On one more occasion, that is in June 2020, the applicant again wrote to the ED Officials that given his disability he could not attend the inquiry during the pandemic and would respond to them later. But the ED persisted with its demand.

9. In this backdrop, the applicant apprehended that the ED might arrest him. So, he applied to the trial Court for anticipatory bail but could not succeed, as his bail application was dismissed on 16.09.2020. Then, he has approached this Court.

(c) The Interim Arrangement:

10. On 07.11.2020, this Court heard both the learned counsel at length and passed an interim order just before the Court closed for vacation. The order, in part, reads:

9. At any rate, this order does not preclude the authorities from summoning the applicant and continuing its investigation, short of subjecting him to arrest. *Once the applicant is summoned, he must appear before the Directorate authorities and co-operate with them, on all occasions. Whenever the applicant is summoned, the authorities will release him by sunset, of course, with a further direction to the applicant to be present the next day, if necessary. It is open for the Directorate to bring to the Court's notice if this arrangement yields no desired result; say, securing the applicant's cooperation.*

10. This arrangement will continue for two weeks. On the reopening day, the applicant will place on record the copies of

FIRs in the predicate offence. Then, the Court will Rule on the merits.

(italics supplied)

11. As the extracted order reveals, the applicant was required to appear before the ED officials whenever he was summoned. But the authorities were required to release him by sunset. If they wanted his presence the next day or any other time, they could summon him. The Court has left it open for the ED officials to bring to the Court's notice "if this arrangement yields no desired result; say, securing the applicant's cooperation." The Court did not impose any limitation on the ED's powers to summon the applicant as many times as it required. Essentially, then, this Court felt that the matter needed deeper examination and that the applicant, as per the medical record, has been suffering from 80% medical disability.

12. Now, when I have taken up the matter for disposal on the merits, the learned Special Counsel for the ED has submitted that though the applicant did attend the inquiry on every occasion he had been summoned, he remained non-cooperative. According to him, his answers were evasive and unhelpful for the ED to gauge the magnitude of the crime and to trace the route of the tainted money. In this backdrop, both the learned counsel have advanced their arguments.

Submissions:

The Applicant:

13. To begin with, Shri A.D. Bhobe, the learned counsel for the applicant, has submitted that the investigation or the inquiry by the ED should not travel beyond the scope of the predicate offence. He points out that in all the four crimes registered against the applicant, he secured anticipatory bail, beginning from 2017. And he has never faced an allegation that he has tried to jump the bail or tried to destroy any evidence, much less mislead the investigation.

14. To elaborate, Shri Bhobe submits that, first, the applicant's son, while in ED's custody for 45 days, divulged all the information he had at his disposal, besides providing access to the documents he possessed. Similarly, even the applicant also gave answers to the best of his knowledge and supplied the documents in his possession. So, he contends that merely because the applicant has not provided tailor-made answers to the ED's question, it should not be a ground for the ED to deprive the applicant of his freedom which is constitutionally protected.

15. Shri Bhobe has, second, elaborated on the origin of the alleged crime. According to him, the complainants, being the foreign nationals, initially lodged a police complaint in 2016 but left the country the next day. Though they once again filed similar complaints containing identical allegations in 2017, again, they did not co-operate with the police in the investigation. In fact, the police filed 'A' summaries highlighting two aspects: that the complainants have not been co-operating and that the crime is of civil nature.

16. In the end, Shri Bhobe concludes his submissions by emphasising that the applicant has been severely disabled, besides having been afflicted with prostate cancer. And there is no chance for him to flee the country because his passport has already been in the custody of the Economic Offences Cell. According to him, even the ED accepted that the whole crime has been borne by the record. So there is hardly any requirement of any custodial interrogation at this juncture.

17. In the end, he has also underlined that the transaction undoubtedly is of civil nature. Thus, Shri Bhobe has urged this Court to allow the bail application.

Enforcement Directorate:

18. Shri Samant, the learned Special Public Prosecutor, has prefaced his arguments by asserting that the predicate offence and the offence under PML Act are two distinct offences. Merely because the applicant

has secured anticipatory bail in the predicate offences, it does not provide him with any licence to insist on the same treatment in the offence registered under the PML Act. According to him, the offence of money laundering is a more serious offence carrying a sentence of 7 to 10 years imprisonment, when the predicate offence such as cheating would attract only three years imprisonment. Shri Samant also wanted the Court to take note that this crime has international remunerations. And even the police of the United Kingdom have been investigating into the applicant's purchasing property in the UK without any known source of income. Besides, he also stresses that even the Interpol is looking for the applicant.

19. About the police filing 'A' summary report, Shri Samant says that it is a matter of record that the police later withdrew those reports with the trial Court's leave. Now again, those three offences have been under active investigation by the Economic Offences Cell. Therefore, it hardly lies in the applicant's mouth to assert that those crimes have been closed.

20. Then Shri Samant has taken me through the FIRs to emphasise that the complainants in the predicate offences have, in fact, spelt out the role the applicant had played in the crimes. That is, the applicant, unlike his wife and daughter, is not a mere name lender; instead, he has actively practised fraud and perpetuated cheating along with his son. In this context, Shri Samant points out that even the first accused was reticent and non-cooperative initially. But when he had been subjected to custodial interrogation, he voluntarily divulged the whole information and provided the necessary documents.

21. Now, about the role the applicant played, the ED wants similar information; but the applicant has not been co-operating. Shri Samant also points out that during whatever limited interrogation, the applicant has revealed that his family has floated 21 more companies and collected money from foreign nationals. Though the initial investigation based on

the predicate offence focused on assets worth about one crore, now it has come to about 12 crores. According to him, the total volume of money transacted with foreign nationals could be about 50 crores. Shri Samant has, however, been fair enough to submit that the entire transaction cannot be treated as a fraudulent transaction. But the applicant and his family have duped the foreign nationals with dubious promises and thus practised fraud and cheating on them. As per Shri Samant, if the Courts view these offences with leniency, it will affect the investments from abroad, and that does not augur well for the nation.

22. Eventually, Shri Samant has referred to certain provisions of law to underline the statutory rigour and the compelling need for the Court to deal with the economic offences, especially under the PML Act, with zero tolerance. Indeed, Shri Samant has drawn my attention to sections 23, 44 and 45 to hammer home his contention that once the Court, *prima facie*, believes that the applicant has been guilty of the offence, he shall not be enlarged on bail. Every offence under PML Act is both non-cognisable and non-bailable.

23. As to the applicant's disabilities, Shri Samant submits that, first, the medical certificate was taken over 20 years ago. Second, the disability does not refer to the entire body but only one organ of the body. That apart, the applicant is said to have been very active in his business affairs, for the record reveals that he has travelled to various countries many times in these years. Therefore, he urges this Court not to get swayed by sympathies when the crime is grave having international ramifications. He has also pointed out that Section 65 read with section 71 of PML Act gives an overriding effect of the Act vis-à-vis Cr. PC.

24. Shri Samant has also pointed out that admittedly the applicant's company has paid commissions to certain people and those people must have used that money either on their own or on the applicant's behalf. In terms of Section 23 and 24 of the PML Act, even such payments in the

name of commissions, etc., should also be traced and treated as money laundering. The ED has no means of knowing the flow of those funds unless the applicant having the requisite knowledge reveals the information. Thus, he opposes the bail application.

Discussion:

25. To begin with, the predicate offences were registered in 2017, and in all those four cases, the applicant secured anticipatory bail. The alleged cheating or fraud, initially, involved about one crore; later, it swelled to about seven crore; now, the ED says the amount may come to about 12 crore. Here, we need not get bogged down with the issues like whether the predicate offence and PML offence are different and distinct. Nor should we be unduly swayed by a hypothetical question like whether the applicant's securing the anticipatory bail in the predicate offences compels the Court to accord to him the same treatment in the PML offence, too.

26. The fact remains that the predicate crimes were registered three years ago. And from day one, the applicant had been free, thanks to the anticipatory bail. That said, he faces no allegation of jumping the bail or abusing the freedom he has been granted. The ED registered the crime only this year. First, it arrested the first accused—the applicant's son. He had been subjected to custodial interrogation for 45 days. The ED does agree that during the custody, the first accused divulged much of the information.

27. True, the ED sent notices to the applicant on six occasions — one time each in January, in February, and in March; again one time each in June, July, and August — in 2020. The notice was said to be under section 50 (2) and (3) of the PML act. Subsection (2) of section 50 empowers a designated ED official to summon any person whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under

this Act. And under subsection (3), any person so summoned “shall be bound to attend in person or through authorised agents”, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined. But subsection (1) of section 50 sets out the scope of that section: it is for the purpose of section 13 of the PML Act. In turn, if we look at section 13, it deals with the powers of the Director to impose fine on the reporting entity.

28. Instead, the summoning, to me, appears to be under section 11 of the PML Act. This provision, too, clothes the Adjudicating Authority with the powers of a civil court under the Code of Civil Procedure to summon a person to give evidence or to produce documents. It is more a judicial power than a police power. Indeed, any person so summoned shall be bound to attend in person or “through [an] authorised agent”, as the Adjudicating Authority may direct. He is bound to state the truth upon any subject respecting which he is examined or make statements, and produce such documents as may be required.

29. The provision permits the person summoned to attend either in person or through an authorised agent unless the summoning authority specifies otherwise. Here, in March 2020, the applicant wrote to the ED that his son is his authorised agent and he would attend for him. But the notices continued. Again, he replied in June that he would attend once the COVID subsides. Despite that, the applicant continued to receive notices. That prompted him to apprehend arrest. With his failure before the trial Court to secure an anticipatory bail, he has come to this Court.

30. In its reply, ED has not denied its intention to arrest the applicant; on the contrary, it has supplied reasons why it should arrest him. First, the ED emphasises that the crime has international ramifications. Agreed. The allegation is that the applicant has bought some property in the UK. And his son, earlier, told the ED that his father had no other source of income than the companies now under the scanner.

The applicant, too, had been interrogated at least pending this bail application. He gave his answers and provided whatever material he could. In fact, some time ago, the officials raided the applicant's house and office and are said to have seized certain documents. All is said and done, I must appreciate the ED's benevolent approach towards the applicant. In its email in June 2020, it told the applicant that given his disability, they would go to his house and record his statement. It has, perhaps, been peeved at the applicant's reticence in response. This allegation that the applicant's family has purchased property overseas is a matter of record, and the UK police investigating that property purchase does not make ED's task any the bigger. All these transactions may be the facets of the same crime, which the ED has already been investigating.

31. The initial complaint on predicate offences concerned about 1.4 crore. Later, with other complaints lodged, it has come to about eight crore. To cover that amount, the ED has attached the applicant's property worth more than that amount. In this context, the applicant's counsel has pointed out that the property seized has been grossly undervalued. For instance, a villa in Goa was valued at 20 lakh rupees when it must be, according to the learned counsel, a few times more valuable. Let us not forget that predicate offence is *a sine qua non* for the ED to investigate.

32. The ED, during its submissions, maintained that even Ankit Kumar, the applicant's son and first accused, too, was initially reluctant to divulge information. Only under the custodial interrogation did he come out. So they want to meet out the same treatment to the applicant as well. The learned Special Counsel for the ED agrees that the applicant appeared before them on every occasion they summoned him, pending this bail application. But his answers are said to be inadequate, or the information he has provided is sketchy. In a sense, the ED wants a judicial stamp of approval on testimonial compulsion—to unravel the crime.

Testimonial Compulsion:

33. Whether summoned under section 11 or 50 of the PML Act, the applicant was supposed to appear before the Adjudicating Authority to give "evidence". That is the expression the statute uses, and that is the expression even the ED's notice to the applicant employs. Granted that the applicant's response to the ED's notices was inadequate, we may look into his conduct after this Court directed, as an interim measure pending this bail application, that he should appear before the authorities. He did appear. Now, the ED's only grievance is that he is not open enough in his answers.

34. As defined under section 2 (na), "investigation" includes all the proceedings under the PML Act conducted by the Director or by any authority for the collection of evidence. Under section 17, when search and seizure take place, the authorities may "examine on oath any person, who is found to be in possession or control of any record or property, in respect of all matters relevant for the purposes of any investigation under this Act." And the provisions of the Code of Criminal Procedure, not inconsistent with the PML Act, will apply "to arrest, search and seizure, attachment, confiscation, investigation, prosecution, and all other proceedings under this Act". One additional factor is that section 50 requires a summoned person to be examined on oath, but section 11 dispenses with the oath formality.

35. So long as a suspect is available for making statements or for producing documents, we cannot prejudge the falsity of those statements and conclude that he should be denied bail.

The Rigours of Section 45 of the PML Act:

36. Section 45 begins with a non-obstante clause. Though PML Act co-exists with Cr PC., it overrides if there is a conflict between them. No person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless (i) the Public Prosecutor has been given an

opportunity to oppose the application for such release; and (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. This limitation on the court's granting bail is in addition to the limitations under Cr PC or any other law in force.

37. Section 23 of the PML Act permits presumption in inter-connected transactions. That is, money laundering may involve two or more inter-connected transactions and one or more such transactions may have been proved to involve money-laundering. Then, it shall be presumed that the remaining transactions form part of such inter-connected transactions. Here, the ED asserts that the applicant's companies have paid commissions to certain agents. About how the agents have used that money—have they used it for themselves or used it for the applicant and his family, benami?—has to be unearthed. But the applicant has not been supplying satisfactory answers. We will leave aside the question as to who should be competent to speak about the commission the agents received: the applicant or the agents! The fact, however, remains that the whole transaction covered by the predicate offences comes to about eight crores and to that extent, the ED has already seized the properties. Besides, on whatever question the ED has found the answer untruthful or inadequate, section 24 of the Act takes care of this shortcoming. It casts a reverse onus on the suspect. The applicant, in that sense, cannot escape the statutory rigour.

What Comes in the Way of Anticipatory Bail?

38. According to the ED, section 45 comes in the way of the anticipatory bail. I am afraid it does not. So held *Nikesh Tarachand Shah v. Union of India*, (2018) 11 SCC 1, in which the constitutional validity of section 45 was in question. This provision has been invalidated on a host of grounds. So the twin conditions now stand effaced from the statute.

But, primarily, section 45, even if it were available, would not apply to anticipatory bails.

39. In *Nikesh Tarachand Shah*, the appellant called out a conundrum to the Court's attention: under section 45, there is "no interdict against anticipatory bail". The contention found favour with the Apex Court, which has held thus:

35. Another conundrum that arises is that, unlike the Terrorist and Disruptive Activities (Prevention) Act, 1987, *there is no provision in the 2002 Act which excludes grant of anticipatory bail. Anticipatory bail can be granted in the circumstances set out in Siddharam Satlingappa Mhetre v. State of Maharashtra*, (2011) 1 SCC 694. Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the Schedule, which may last throughout the trial. *Obviously, for grant of such bail, Section 45 does not need to be satisfied*, as only a person arrested under Section 19 of the Act can only be released on bail after satisfying the conditions of Section 45. But insofar as pre-arrest bail is concerned, Section 45 does not apply on its own terms. This, again, would lead to an extremely anomalous situation."

(italics supplied)

40. Indeed, *Siddharam Satlingappa Mhetre* has quoted with approval the case holding of *Gurbaksh Singh Sibbia v. State of Punjab*, (1980) 2 SCC 565. It has, thus, held that (a) section 438(1) is to be interpreted in light of Article 21 of the Constitution of India; (b) order under section 438 would not affect the right of police to conduct investigation; (c) conditions mentioned in section 437 cannot be read into section 438; (d) although the power to release on anticipatory bail can be described as of an "extraordinary" character, this would "not justify the conclusion that the power must be exercised in exceptional cases only." Powers are discretionary to be exercised in light of the circumstances of each case; (e) initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to

requirements of the section, and suitable conditions should be imposed on the applicant.

41. In the end, *Siddharam Satlingappa Mhetre* has enlisted the factors and parameters the Court should consider while dealing with the anticipatory bail:

- i. The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;
- ii. The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a Court in respect of any cognisable offence;
- iii. The possibility of the applicant to flee from justice;
- iv. The possibility of the accused's likelihood to repeat similar or the other offences.
- v. Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her.
- vi. Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people.
- vii. The courts must evaluate the entire available material against the accused very carefully. The court must also clearly comprehend the exact role of the accused in the case. In the cases in which accused is implicated with the help of Sections 34 and 149 of IPC, the court should consider with even greater care and caution because over implication in the cases is a matter of common knowledge and concern;
- viii. While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors; namely, no prejudice should be caused to the free, fair and full investigation and there should be the prevention of harassment, humiliation and unjustified detention of the accused;
- ix. The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;
- x. Frivolity in prosecution should always be considered,, and it is only the element of genuineness that shall have to be considered in the matter of grant of bail and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.

42. If we take the above criteria, what we have before us is an economic offence, having its own gravity. The applicant has no criminal antecedents, save this batch of cases involving the predicate offences. The applicant, in his mid-60s, suffers from 80% physical disability (both legs polio affected), besides suffering from prostate cancer. So the possibility

of his fleeing from justice does not arise. Even otherwise, he has been on anticipatory bail since 2017 in the cases of predicate offences. I reckon, given his physical condition, it is unlikely for the applicant alone to repeat similar or the other offences.

43. I have already set out the mitigating circumstances based on the material available: the money involved in the predicate offences; the properties already seized; the material already gathered; and so on. As I have observed in the interim order, dt. 07.11.2020, if the applicant is directed to be available for investigation whenever summoned, we strike a balance between the two factors: the free, fair and full investigation vis-à-vis harassment, humiliation and unjustified detention of the accused. Nor do I find any ground to entertain any reasonable apprehension that the applicant may tamper with the witness or pose a threat to the complainants—foreign nationals.

Caveat:

44. This anticipatory bail does not curtail the ED's powers of further investigation. This Court's observations are to be strictly confined to the applicant's claim for the anticipatory bail. That is, the observations neither inculcate or exculpate the applicant; rather, they have been made in the context of the anticipatory bail application. Nothing beyond.

Result:

45. I, therefore, allow this Anticipatory Bail Application subject to these conditions:

ORDER

- (i) The application for anticipatory bail is allowed.
- (ii) In the event of his arrest in the matter of ECIR No.1 of 2020, registered by the Enforcement Directorate at Goa, the applicant shall be released on bail on his executing P.R. Bond for ₹50,000/- and on his furnishing

two sureties, each for the like sum, to the satisfaction of the learned trial Judge.

(iii) The applicant should not leave the State of Goa, without prior permission of the Enforcement Directorate.

(iv) The applicant shall cooperate with the ED during the investigation and respond to their notices at all times.

(v) The applicant shall not commit similar or other offences.

(vi) The applicant's failure to abide by these conditions will entail the ED to apply for the cancellation of the anticipatory bail now granted to the applicant.

(vii) The Bail Application stands disposed of.

DAMA SESHADRI NAIDU, J.

NH