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C.R.R.263 of 2023

In Re: An application under Section 482 read with Section 401 of the Code of Criminal Procedure;

Enforcement Directorate, Kolkata Zone-II
Versus
Shri Shailesh Kumar Pandey and another

Mr. Phiroze Edulji,
Mr. Samrat Goswami.
…for the petitioner.

Mr. Sekhar Basu,
Mr. Milon Mukherjee,
Mr. Ayan Bhattacherjee,
Mr. Jakir Hossain,
Mr. Md. Maqsood Alam,
Ms. Ahie Arma,
Ms. Ritu Das,
Mr. Suman Majumder.
…for the opposite parties.

The present revisional application has been preferred challenging the order dated 21.01.2023 passed by the learned Judge-in-Charge, Special CBI Court -I, Bichar Bhawan, Calcutta in ML Case No.01 of 2023 arising out of ECIR No.ECIR/KLZO-II/21/2022 dated 21/10/2022.

The grievance of the petitioner/Enforcement Directorate were to the manner in which the production warrant which was issued on 18.01.2023 by the Learned Special Court was recalled and the accused persons were directed to be set at liberty.

Mr. Edulji, learned advocate appearing for the petitioner/Enforcement Directorate submits that the ECIR/KLZO-II/21/2022 was registered by the Enforcement Directorate based on

the First Information Report registered being Hare Street Police Station Case No.290/2022 dated 14.10.2022 under Sections 120B/420/467/ 471 of the Indian Penal Code on the basis of a complaint lodged by Canara Bank officials.

Learned advocate appearing for the petitioner draws the attention of the Court to the application under Section 267 of the Code of Criminal Procedure filed by the petitioner against the opposite parties namely, Shailesh Kumar Pandey and Prasenjit Das.

In respect of opposite party no.1 Shailesh Kumar Pandey paragraphs **10 and 11** of the application under Section 267 of Cr.P.C. are relevant which are set out as follows:-

> *"**10.** That, during investigation, public money amounting to more than Rs.108 crore has been credited into the account of TPG Techno Service bearing account no.3306201002020 maintained with Canara Bank. Further from the said account, huge amount of Rs.90,00,000/- have been transferred in different trenches to the account of Shailesh Pandey, which is evident from the bank account statement of TPG Techno Service and a gist of the same is annexed as Annexure – B."*
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> ***11.** That, based on investigation conducted so far, it has been established that the accused Shailesh Kumar Pandey is involved in the commission of offence of money laundering, by indulging in criminal conspiracy with several other persons, to obtain proceeds of crime with the aim of converting the illegal money into legitimate money. He has knowingly indulged, assisted, involved and is a party in the process and activity connected to the proceeds of crime including its concealment, possession, acquisition, use and projecting and claiming the said proceeds of crime as untainted property deriving illegal monetary gains and hence, has committed offence of Money*

Laundering u/s 3 of Prevention of Money Laundering Act, 2002 punishable under section 4 of the said Act."

In respect of opposite party no.2 Prasenjit Das paragraphs **9, 10 and 11** of the application under Section 267 of Cr.P.C. are relevant which are set out as follows:-

*"**9.** That during investigation, it has also been revealed that more than 200 accounts were opened in various Banks, to collect the scam money and further route the same, to utilize it for the personal gains, of the scamster/accused.*

***10.** That during investigation, it has been revealed that Prasenjit Das is the Director of various companies like Nexateq Innovation Pvt. Ltd., Avonarc Infra Pvt. Ltd., Govanta Agro Pvt Ltd, Actileaf Agro Pvt Ltd, Verozi Hotels and Hospitality Pvt Ltd, TPG Commercials Pvt Ltd., wherein huge public funds have been transferred/credited into the accounts of aforementioned companies and subsequently these funds have been used for purchase of movable/immovable properties for their personal use/gain.*

11. That, based on investigation conducted so far, it has been established that the accused Prasenjit Das is involved in the commission of offence of money laundering, by indulging in criminal conspiracy with several other persons, to obtain proceeds of crime with the aim of converting the illegal money into legitimate money. He has knowingly indulged, assisted, involved and is a party in the process and activity connected to the proceeds of crime including its concealment, possession, acquisition, use and projecting and claiming the said proceeds of crime as untainted property deriving illegal monetary gains and hence, has committed offence of Money Laundering u/s 3 of Prevention of Money Laundering Act, 2002 punishable under section 4 of the said Act."

Learned advocate emphasized that custody of the

opposite parties are required on the following grounds:-

(a) To ascertain the trail of proceeds of crime involved in the present case;

(b) To ascertain further beneficiaries of the aforesaid proceeds of crime involved in the present case;

(c) To ascertain the role of the other alleged/suspected persons involved in the above said laundering of proceeds of crime;

(d) To identify the properties (immovable/movable) acquired from proceeds of crime by the accused persons.

Records reflect that on 18.01.2023 the Learned Special Court was pleased to issue production warrant directing the Superintendent, Presidency Correctional Home, Alipore to produce the accused/opposite parties physically on 21.01.2023.

Learned advocate appearing for the Enforcement Directorate submits that on 21.01.2023 when the accused persons were produced before the Learned Special Court, the petitioner filed application under Section 167(2) of the Code of Criminal Procedure read with Section 2(1)(na) and Section 65 of PML Act, 2002 thereby praying for 15 days custody on the grounds which were earlier canvassed before the same Court. Learned advocate criticized the order of the Learned Special Judge passed on 21.01.2023 thereby holding the registration of M.L. Case No.1 of 2023 to be inadvertent mistake, recalling the production warrant, rejecting the prayer of the Enforcement Directorate for custody of the accused persons and directing the Superintendent, Presidency Correctional Home for releasing the accused persons, if they are not wanted in connection

with any case.

Mr. Edulji, learned advocate submits that once the production warrant was executed, the Learned Special Court had no authority to recall the same and foundation of the said order is on a mis-reading of the judgment of the Hon'ble Supreme Court passed in ***Vijay Madanlal Choudhary & Ors. Vs. Union of India & Ors.*** reported in ***2022 SCC Online 929***. Learned advocate also relied upon paragraph 48 of ***Directorate of Enforcement Vs. Deepak Mahajan & Anr.*** reported in ***(1994) 3 SCC 440*** in order to emphasize on the issue of 'custody' and 'arrest'. Paragraph 48 so relied upon by the learned advocate is set out as follows:-

> ***"48.*** *Thus the Code gives power of arrest not only to a police officer and a Magistrate but also under certain circumstances or given situations to private persons. Further, when an accused person appears before a Magistrate or surrenders voluntarily, the Magistrate is empowered to take that accused person into custody and deal with him according to law. Needless to emphasize that the arrest of a person is a condition precedent for taking him into judicial custody thereof. To put it differently, the taking of the person into judicial custody is followed after the arrest of the person concerned by the Magistrate on appearance or surrender. It will be appropriate, at this stage, to note that in every arrest, there is custody but not vice versa and that both the words 'custody' and 'arrest' are not synonymous terms. Though 'custody' may amount to an arrest in certain circumstances but not under all circumstances. If these two terms are interpreted as synonymous, it is nothing but an ultra legalist interpretation which if under all circumstances accepted and adopted, would lead to a startling anomaly resulting in serious consequences, vide Roshan Beevi [1984 Cri LJ 134 : (1984) 15 ELT 289 : 1983 MLW (Cri) 289 (Mad)] ."***

Learned advocate for the Enforcement Directorate also relies upon ***Deepak Gupta Vs. Enforcement Directorate of India ABLAPL No.9695 of 2022*** downloaded from the official website of the Orissa High Court paragraph 24 of the said judgment so relied upon is set out as follows:-

> ***"24****. It is clear that the meaning of the word 'custody' has to be taken with reference to the context in which it is used. The question as to what would constitute arrest and custody has been the subject matter of decisions of different High Courts. This issue was grappled with by the Full Court of the High Court of Madras in the case of Roshan Beevi v. Joint Secretary to Government of Tamil Nadu reported in 1983 SCC OnLine Mad 163, wherein the Hon'ble High Court was pleased to observe as follows:*
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> > *"16. From the various definitions which we have extracted above, it is clear that the word 'arrest', when used in its ordinary and natural sense, means the apprehension or restraint or the deprivation of one's personal liberty. The question whether the person is under arrest or not, depends not on the legality of the arrest, but on whether he has been deprived of his personal liberty to go where he pleases. When used in the legal sense in the procedure connected with criminal offences, an arrest consists in the taking into custody of another person under authority empowered by law, for the purpose of holding or detaining him to answer a criminal charge or of preventing, the commission of a criminal offence. The essential elements to constitute an arrest in the above sense are that there must be an intent to arrest under the authority, accompanied by a seizure or detention of the person in the manner known to law, which so understood by the person arrested. In this connection, a debatable question that*

arises for our consideration is whether the mere taking into custody of a person by an authority empowered to arrest would // 18 // amount to 'arrest' of that person and whether the terms 'arrest' and 'custody' are synonymous.

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*37. For all the discussions made above, we hold that 'custody' and 'arrest' are not synonymous terms. It is true that in every arrest there is a custody, but not vice versa. A custody may amount to an arrest in certain cases but not in all cases but not in all cases. In our view the interpretation that the two terms 'custody' and 'arrest' are synonymous is an ultra legalist interpretation, which if accepted and adopted, would lead to a startling anomaly resulting in serious consequences.***"**

Mr. Basu and Mr. Mukherjee, learned senior advocates representing the accused/opposite parties resisted the submission of the Enforcement Directorate and reasoned that the order dated 21.01.2023 passed by the Learned Special Court was on the basis of a precedent pronounced by the Hon'ble Supreme Court in ***Vijay Madanlal Choudhary (supra).*** According to the learned senior advocate the finding of the Learned Special Court are based on the ratio settled by the Hon'ble Supreme Court. Reliance was placed on ***J. Sekar alias Sekar Reddy Vs. Directorate of Enforcement*** reported in ***2022 SCC Online SC 561*** and attention of the to paragraph 23 which is set out as follows:-

"23. *In view of the aforesaid legal position and on analysing the report of the IT Department and the reasoning given by CBI while submitting the final closure report in RC MA1 2016 A0040 and the order passed by the adjudicating authority, it is clear that for*

*proceeds of crime, as defined under Section 2(1)(u) of PMLA, the property seized would be relevant and its possession with recovery and claim thereto must be innocent. In the present case, the Schedule Offence has not been made out because of lack of evidence. The adjudicating authority, at the time of refusing to continue the order of attachment under PMLA, was of the opinion that the record regarding banks and its officials who may be involved, is not on record. Therefore, for lack of identity of the source of collected money, it could not be reasonably believed by the Deputy Director (ED) that the unaccounted money is connected with the commission of offence under PMLA. Simultaneously, the letter of the IT Department dated 16-5-2019 and the details as mentioned, makes it clear that for the currency seized, the tax is already paid, therefore, it is not the quantum earned and used for money laundering. In our opinion, even in cases of PMLA, the Court cannot proceed on the basis of preponderance of probabilities. On perusal of the Statement of Objects and Reasons specified in PMLA, it is the stringent law brought by Parliament to check money laundering. Thus, the allegation must be proved beyond reasonable doubt in the Court. Even otherwise, it is incumbent upon the Court to look into the allegation and the material collected in support thereto and to find out whether the prima facie offence is made out. Unless the allegations are substantiated by the authorities and proved against a person in the court of law, the person is innocent. In the said backdrop, the ratio of the judgment of Radheshyam Kejriwal [Radheshyam Kejriwal v. State of W.B., (2011) 3 SCC 581 : (2011) 2 SCC (Cri) 721] in paras 38(vi) and (vii) are aptly applicable in the facts of the present case."***"**

Learned senior advocate appearing for the opposite parties has also relied upon paragraph 467(v)(d) of ***Vijay Madanlal Choudhary (supra)*** wherein it was held as follows:-

"467(v)(d) *The offence under Section 3 of the 2002 Act is*

*dependent on illegal gain of property as a result of criminal activity relating to a scheduled offence. It is concerning the process or activity connected with such property, which constitutes the offence of money-laundering. The Authorities under the 2002 Act cannot prosecute any person on notional basis or on the assumption that a scheduled offence has been committed, unless it is so registered with the jurisdictional police and/or pending enquiry/trial including by way of criminal complaint before the competent forum. If the person is finally discharged/acquitted of the scheduled offence or the criminal case against him is quashed by the Court of competent jurisdiction, there can be no offence of money-laundering against him or any one claiming such property being the property linked to stated scheduled offence through him.***"***

Lastly, it was submitted on behalf of the accused/opposite parties that the Enforcement Directorate cannot pursue an investigation until and unless a finality is attained in respect of the criminal proceedings and to that extent according to the opposite parties the order of the Learned Special Court dated 21.01.2023 is based on settled principles of law.

I have taken into account the submissions of the learned advocates appearing for the petitioner/ED as also that of the accused/opposite parties and I have also assessed the order passed on 21.01.2023 by the Learned Special Court. On an assessment of the said order I find that the said order was based on paragraphs 456, 457 and 458 of the judgment of the Hon'ble Supreme Court in ***Vijay Madanlal Choudhary (supra)*** wherein the Hon'ble Supreme Court was drawing an analogy between ECIR vis-à-vis FIR in the background of furnishing copy of ECIR to the person apprehending

arrest or after their arrest. The same has no application to the situation dealt with by the Learned Special Court. It was incumbent upon the learned Special Court to take into account paragraphs 323, 324 of the said judgment which are set out as follows:

> ***"323.*** *In the context of this provision, the challenge is that in absence of any formal complaint being filed, arrest under Section 19 is being made by the authorised officers. Whereas, the purport of Section 167 of the 1973 Code would suggest that the person can be arrested by the jurisdictional police without warrant under Section 41 of the 1973 Code only upon registration of a complaint under Section 154 of the 1973 Code in connection with cognizable offence or pursuant to the order of the Court. Even, in case of arrest pursuant to the order of the Court, a formal complaint against such person accusing him of being involved in commission of an offence is essential. Moreover, the person produced before the Court would be at a loss to know the grounds for arrest unless a formal FIR or complaint is filed accusing him about his involvement in the commission of an offence. The provision if interpreted to permit the authorised officer to arrest someone being involved in the commission of offence of money-laundering without a formal complaint against him, would be ex facie manifestly arbitrary and unconstitutional.*
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> ***324.*** *This argument clearly overlooks the overall scheme of the 2002 Act. As noticed earlier, it is a comprehensive legislation, not limited to provide for prosecution of person involved in the offence of money-laundering, but mainly intended to prevent money-laundering activity and confiscate the proceeds of crime involved in money-laundering. It also provides for prosecuting the person involved in such activity constituting offence of money-laundering. In other words, this legislation is an amalgam of different facets including setting up of agencies and mechanisms for coordinating measures for*

combating money-laundering. Chapter III is a provision to effectuate these purposes and objectives by attachment, adjudication and confiscation. The adjudication is done by the Adjudicating Authority to confirm the order of provisional attachment in respect of proceeds of crime involved in money-laundering. For accomplishing that objective, the authorities appointed under Chapter VIII have been authorised to make inquiry into all matters by way of survey, searches and seizures of records and property. These provisions in no way invest power in the Authorities referred to in Chapter VIII of the 2002 Act to maintain law and order or for that matter, purely investigating into a criminal offence. The inquiry preceding filing of the complaint by the authorities under the 2002 Act, may have the semblance of an investigation conducted by them. However, it is essentially an inquiry to collect evidence to facilitate the Adjudicating Authority to decide on the confirmation of provisional attachment order, including to pass order of confiscation, as a result of which, the proceeds of crime would vest in the Central Government in terms of Section 9 of the 2002 Act. In other words, the role of the Authorities appointed under Chapter VIII of the 2002 Act is such that they are tasked with dual role of conducting inquiry and collect evidence to facilitate adjudication proceedings before the Adjudicating Authority in exercise of powers conferred upon them under Chapters III and V of the 2002 Act and also to use the same materials to bolster the allegation against the person concerned by way of a formal complaint to be filed for offence of money-laundering under the 2002 Act before the Special Court, if the fact situation so warrant. It is not as if after every inquiry prosecution is launched against all persons found to be involved in the commission of offence of money-laundering. It is also not unusual to provide for arrest of a person during such inquiry before filing of a complaint for indulging in alleged criminal activity. The respondent has rightly adverted to somewhat similar provisions in other legislations, such as Section 35 of

FERA and Section 102 of Customs Act including the decisions of this Court upholding such power of arrest at the inquiry stage bestowed in the Authorities in the respective legislations. In Romesh Chandra Mehta532, the Constitution Bench of this Court enunciated that Section 104 of the Customs Act confers power to arrest upon the Custom Officer if he has reason to believe that any person in India or within the Indian Customs waters has been guilty of an offence punishable under Section 135 of that Act. Again, in the case of Padam Narain Aggarwal533, while dealing with the provisions of the Customs Act, it noted that the term "arrest" has neither been defined in the 1973 Code nor in the Penal Code, 1860 nor in any other enactment dealing with offences. This word has been derived from the French word "arrater" meaning "to stop or stay". It signifies a restraint of a person. It is, thus, obliging the person to be obedient to law. Further, arrest may be defined as "the execution of the command of a court of law or of a duly authorised officer". Even, this decision recognises the power of the authorised officer to cause arrest during the inquiry to be conducted under the concerned legislations. While adverting to the safeguards provided under that legislation before effecting such arrest, the Court noted as follows:

"Safeguards against abuse of power

36. From the above discussion, it is amply clear that power to arrest a person by a Customs Officer is statutory in character and cannot be interfered with. Such power of arrest can be exercised only in those cases where the Customs Officer has "reason to believe" that a person has been guilty of an offence punishable under Sections 132, 133, 135, 135-A or 136 of the Act. Thus, the power must be exercised on objective facts of commission of an offence enumerated and the Customs Officer has reason to believe that a person sought to be arrested has been guilty of commission of such offence. The power to arrest thus is circumscribed by objective considerations and cannot be

exercised on whims, caprice or fancy of the officer.

37. The section also obliges the Customs Officer to inform the person arrested of the grounds of arrest as soon as may be. The law requires such person to be produced before a Magistrate without unnecessary delay.

*38. The law thus, on the one hand, allows a Customs Officer to exercise power to arrest a person who has committed certain offences, and on the other hand, takes due care to ensure individual freedom and liberty by laying down norms and providing safeguards so that the power of arrest is not abused or misused by the authorities. ….”***”**

Having considered the aforesaid observations of the Hon’ble Supreme Court, I am of the opinion that the interpretation of the learned Senior advocate appearing for the opposite parties that ECIR can be registered only after finality is attained in a criminal proceeding is not acceptable to this Court.

Taking into account the provisions of Section 19(3), Section 45 (Explanation), Section 46, Section 65 and Section 71 of the PMLA Act, 2002 read with paragraph 324 of the judgment of ***Vijay Madanlal Choudhary (supra),*** I hold that the foundation, finding and conclusion of the order dated 21.01.2023 passed by the Learned Special Judge is bad in law and the same as such is set aside.

Accordingly, CRR 263 of 2023 is allowed.

Mr. Edulji, learned advocate appearing for the ED on 08.02.2023 pointed out that when the revisional application was filed before this Court the accused/opposite parties were in custody

in connection with Hare Street Police Station Case No.290/2022 dated 14.10.2022, although it was represented before this Court that the accused/opposite party during the pendency of the present revisional application will not pursue the remedy for bail before the Learned CMM Court, Calcutta on 06.02.2022 and 07.02.2023, they were released on bail in spite of the Enforcement Directorate informing the Learned CMM, Calcutta regarding such representation. Learned senior advocate appearing for the accused/opposite parties in his usual fairness submitted that they were not informed of such development and stated that the accused/opposite parties would appear before this Court on 09.02.2023.

Today, it has been informed that the accused/opposite parties are present before this Court.

Accordingly, the Enforcement Directorate is directed to take both the accused persons in custody and produce them before the Learned Special Court by 3 p.m. advancing their prayers for custody, if required.

Pending applications, if any, are consequently disposed of.

All parties shall act on the server copy of this order duly downloaded from the official website of this Court.

(Tirthankar Ghosh, J.)