2024:DHC:8972

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

% Reserved on : 18.11.2024
Pronounced on : 20.11.2024

\+ **BAIL APPLN. 3548/2024 and CRL.M.(BAIL) 1644/2024**

HARI OM RAI ..... Petitioner
Through: Mr.Vikas Pahwa, Sr. Advocate with Mr.Abhay Raj, Mr.Anshay, Ms.Namisha and Ms.Sanskriti, Advocates

Versus

DIRECTORATE OF ENFORCEMENT ..... Respondent
Through: Mr.Zoheb Hossain, Spl. Counsel with Mr.Manish Jain, SPP with Mr.Vivek, Ms.Pranjal and Mr.Rishabh, Advocates

CORAM:
HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

1. By way of present bail application, the petitioner/applicant seeks regular bail in the proceedings emanating out of ECIR/STF/02/2022 dated 03.02.2022. The said ECIR was registered on the basis of the FIR No. 0807/2021 dated 05.12.2021 registered under Sections 417/120B/420 IPC at PS Kalkaji, Delhi. Another FIR No. 190/2021 was also later included by the respondent in the prosecution complaint.

2. It has been alleged in the prosecution complaint that Vivo Mobile Communication Co. Ltd, China (formerly BBK Communication Co. Ltd.) (hereinafter, referred to as 'Vivo China') along with others conspired to fraudulently set up Vivo group of companies in India without revealing their true beneficial ownership and carried out mis-declarations before government bodies. It is alleged that Vivo Mobile India Private Limited

(hereinafter, referred to as 'Vivo India') and its State Distribution Companies (SDCs) concealed their Chinese ownership. While it was projected that Vivo India is a subsidiary of a Hong Kong based company viz. Multi Accord Limited, however investigation has established that it was under the ultimate control of Vivo China.

It is also alleged that Vivo India had remitted funds outside India to the tune of Rs 70,837 Crores out of the total funds i.e. Rs. 71,625 Crores accumulated by them from sale of goods in the period from January 2015 to March 2021. Thus, Vivo China, through Vivo India has created an elaborate network of companies under a corporate veil. All the SDCs are controlled by Vivo India which in turn is controlled by Vivo China. By creating the said meshed and Pan-India structure, Vivo India has acquired Proceeds of Crime to the tune of Rs. 2,02,41,17,72,292.89/-. The proceeds so acquired were then siphoned off by Vivo India to Overseas trading companies many of which are in control of Vivo China.

Some of the other illegalities which are alleged to have been committed include use of forged driving licenses for opening bank accounts of various SDC's of Vivo India as well as Grand Prospect International Communication Pvt. Ltd, (hereinafter, referred to as 'GPICPL') Himachal Pradesh for obtaining Director Identification Number by Chinese nationals. Illegalities in visa obtainment by various entities have also been alleged.

3. The present applicant is the Managing Director of M/s Lava International Ltd., (hereinafter, referred to as 'Lava') engaged in the business of manufacture and sale of mobile phones under the brand 'Lava' and a competitor of Vivo. He has been arrayed as accused No. 20 in the prosecution complaint. It has been alleged that the applicant had invited

Chinese Nationals from Vivo China in 2013-2014 with the intent of enabling them to set up a web of companies in India by concealing true ownership. He is also alleged to have provided them logistical and ground support and helped them get a foothold in India by circumventing FDI norms. He is also alleged to have transferred around Rs. 3.17 Crores in total, including Rs 2.62 Crores from Lava and Rs 55 lacs from his personal account to one Labquest Engineering Pvt. Ltd.(hereinafter, referred to as 'Labquest') to help Vivo China set up a number of companies without disclosing that it is the controller of those entities.

4. Mr. Vikas Pahwa, learned Senior Counsel appearing on behalf the applicant submits that the applicant is innocent and has been falsely roped in the present case and that there is no material which has been produced by the respondent to indicate the complicity of the applicant in any offence. It is submitted that the applicant is entitled to be released on bail because, firstly, he satisfies the twin conditions stipulated under Section 45 of PMLA and secondly, because his right to life and liberty as enshrined in Article 21 of Constitution of India is being affected by the slow pace of trial which is not likely to conclude in the foreseeable future.

5. Contending that the twin conditions in the present case stand satisfied, learned Senior Counsel submits that there is no allegation that the applicant was involved in the operation of any of the companies related to Vivo, nor was he a shareholder or Director in any of these companies. Moreover, it is contended that no evidence has been put forth by the respondent to show that the applicant had knowledge of the alleged offences committed by Vivo, or that he ever received or otherwise dealt in any Proceeds of Crime.

With respect to the issuance of invitation letters to 19 Chinese nationals, it is submitted that the same were issued between December 2013 and April 2014 to explore the possibilities of a joint venture between Vivo and Lava, which eventually did not lead to fruition. It is submitted that none of these invitations were extended to persons who are alleged to have committed the scheduled offence as the invitation letters were issued prior to the period of offence stated in the FIR which is from 03.12.2014 to 13.12.2021. Moreover, the allegation of violation of Foreigners Act is with respect to 30 out of 193 Visas granted to Chinese nationals. It is submitted that none of these 193 Visas were granted on invitations extended by the applicant/Lava. It is further submitted that even as per the Prosecution Complaint, the Visa invitations for *Zhang Jie* and *Zhengshen Ou* who are alleged to have committed the scheduled offence by submitting false documents to MCA, were from M/s GPICPL for a subsequent period and not the Applicant. It is contended that this can also be verified from the fact that the name of these two persons does not figure in the list of 19 Chinese nationals who were initially invited by the applicant. It is also contended that the mere act of issuing invitation letter by the applicant would not clothe the applicant with *mens rea*, regarding the subsequent occurrence of a scheduled offence.

6. With respect to the alleged remittance of Rs. 3.17 Crores, it is submitted that the same was given to *Labquest* by way of a loan from January 2014 to December 2014. The same is stated to have been repaid to Lava by March 2015 with interest, much prior to the commission of the alleged scheduled offence.

It is further contended that there is not an iota of evidence to show that the applicant ever received money from Vivo in an overseas entity. The entire allegation is based on surmises and conjectures with respect to an email dated 23.07.2014. It is contended that the email merely records options suggested by Vivo and the reply to the email would show that *Labquest* arranged its own funds and further, no transaction has been brought on record to show that money was transferred to the 'overseas entity' of the applicant by Vivo. It is contended that by the time this email was sent, the applicant had already remitted at least 5 tranches of loan to *Labquest* from January 2014 to July 2014. In light of the same, the email was inconsequential and has been blown out of proportions by the respondent. In so far as the alleged FDI violations are concerned, it is contended that the same would fall under the penal provisions of FEMA, which is not a scheduled offence.

7. The second leg of arguments put forth on behalf of the applicant is that his constitutional right to life and liberty is being affected on account of the slow pace of trial. It is submitted that the investigation was initiated in 2022 and the prosecution complaint has named 48 accused persons and cited 527 witnesses. There are 80,000 pages of documents which are required to be analysed. It is further submitted that a supplementary prosecution complaint dated 19.02.2024 has also been filed which has increased the number of accused to 53, 15 additional witnesses have been cited and 3500 more pages of documents have been added. It is submitted that the applicant has been in custody since 10.10.2023 and the trial is still at the stage supply of documents under Section 207 Cr.P.C. As the charges are yet to be framed, the trial is likely to take a long time.

On parity, it is submitted that out of the 7 accused persons who were arrested, the arrest of 3 persons has been declared illegal vide order dated 30.12.2023. Co-accused *Nitin Garg* has been granted bail vide order dated 29.01.2024, *Rajan Malik* and *Guangwen Kuang @ Andrew* (Employee of Vivo) have granted bail by the ASJ vide orders dated 09.10.2024 and 11.11.2024 respectively.

Lastly, it is submitted that the applicant satisfies the triple test as there is no material brought on record by the respondent to show that applicant has tried influencing witnesses or tampering with evidence.

8. *Per contra*, Mr. Zoheb Hossain, learned special counsel on behalf of the respondent has vehemently opposed the bail application and submits that the applicant is involved not only in the offence of money laundering by actively assisting in the generation of proceeds of crime, but is also involved in destruction of evidences, setting up of companies based on forged documents, giving invitation letters to persons who gave forged driving licenses to set up GPCIPL.

It is submitted that investigation revealed that information of multiple illegalities that had taken place in the process of Visa obtainment and the violations of section 14 of the Foreigners Act, 1946, which is a scheduled offence, were shared by the respondent with EOW, Delhi Police under section 66 (2) of PMLA 2002 and the same had been added in the FIR No. 190/2021.

One instance of such violation is that the applicant's company had issued invitation letters to *Zhengshen Ou* and *Zhang Jie*, both Directors and Shareholders of M/s GPICPL. Both of them were found to be in possession of forged driving licenses and utilised these forged driving licenses to

acquire valuable security i.e. Director Identification Number issued by MCA in June 2015 and opening of Bank Accounts with HDFC Bank. In total, 4 people in relation to 3 SDC's had given forged licenses.

9. It is the case of the prosecution that the applicant used *Labquest* as a front for establishing the network of Vivo companies in India. It is alleged that from May 2014 to December 2014, an amount of Rs. 2.62 Crores and Rs 55 Lacs respectively was transferred by Lava International and the applicant respectively to *Labquest* for the purpose of setting up of offices/residential accommodation for the Chinese nationals of M/s Vivo India and its SDCs and this amount was given without any agreement or collateral. It is contended that *Labquest* was also used to circumvent the government approval which was required for making 100% FDI investment in Single Brand Retail Trading. The entities mis-declared to government authorities that they are in a 100% Cash and Carry business while in actuality, *Labquest* was carrying out their retail business.

It is further submitted that Labquest did not undertake any business activity from 2012 to 2014. Its first bank account was set up in 2014. Moreover, Mr. *Rajan Malik*, who set up Labquest, was in fact the statutory auditor of Lava. Investigation has revealed that employees of Lava International were authorized by Labquest to execute the Lease deeds for acquiring residential accommodation for the Chinese as well as office spaces of SDCs, much before their incorporation on directions of the applicant. It is contended that Lava employees were A/R of Labquest who leased out office space to Vivo. Reliance has also been placed by the learned Special Counsel for the respondent on email communications dated 23.07.2014 between *Rajesh Sethi*, CFO of Lava and *Alice Cheng*, CFO of Vivo China wherein

they were discussing ways of arranging funds for incorporation of Vivo India and other entities through Labquest. One of the ways which was discussed was that Lava would give money to Labquest, while its overseas entities would receive funds in USD. It is contended that this shows that the transactions between Lava International Limited and Labquest were not genuine business transactions.

10. Next, It is contended that the role of applicant is not only limited to helping Vivo in statutory compliance but he has continued to provide guidance as to the ongoing criminal investigation, as is evident from email communication dated 30.06.2023 between him and *Jerome Chen* and *Luis*, of Vivo India.

Moreover, in the WhatsApp chats between *Jerome Chen* (CEO, Vivo India) and the applicant on 28.07.2023, *Jerome* had asked the applicant if he could help resolve immigration issues of employees of Vivo India and the applicant had agreed to help in fighting their legal battles. It is submitted these are proof as to the attendant circumstances that the applicant is giving suggestions and the same are relevant as Section 10 of the Evidence Act would extend to events even after the filing of prosecution complaint.

11. The bail application has also been opposed on the ground that the applicant had tried to destroy the evidentiary records. It is submitted that Forensic analysis of data extracted from his laptop has revealed that the applicant was searching ways in which the email data can be deleted permanently on 01.09.2022. Emails of the period prior to July, 2015 were not found on the server of Lava International during the search operation.

It is contended that the applicant had misused the liberty granted to him when he was released on interim bail and for which he was directed to

surrender and an FIR No. 234/2024 was also registered by PS Hauz Khas on 17.05.2024 under Sections 419/420/464/468/471/120-B IPC. It is contended that the subsequent involvement of the accused will result in the application failing to meet the test in the second part of Section 45 PMLA, as it is evident that the applicant is likely to commit any offence when enlarged on bail. The orders passed in relation to other co-accused have been challenged and the same are pending consideration.

Lastly, it is submitted that the period of incarceration is only around 10 months and there is no delay in the trial affecting the applicants right to life and liberty.

12. I have heard learned counsel for the parties and have gone through the record.

13. Pertinently, as noted above, the FIR No. 0807/2021 was registered under sections 417/120B/420 IPC based on a complaint by Sh. Manjit Singh, the then Dy. Registrar of Companies, MCA. Another FIR No. 190/2021 was registered by the Economic Offences Wing (EOW) of Delhi Police on the same complaint, with additional charges under sections 417/420/468/471/120B IPC, against 9 entities. Section 14 of the Foreigners Act was also added to FIR No.190/2021. The ECIR/STF/02/2022 came to registered on 03.02.2022. It is pertinent to mention that there is no allegation levelled qua the applicant in the ECIR. The applicant joined the investigation on 10.11.2022, 11.07.2023 and 9.10.2023. He was arrested on the intervening night of 09/10.10.2023. The Prosecution Complaint was filed on 06.12.2023 and the supplementary Complaint was filed on 19.02.2024.

14. Since the offence pertains to money laundering, apart from the usual considerations, it would have to be seen whether the twin conditions stipulated in Section 45 of the PMLA are met. A plain reading of Section 45 of the PMLA shows that the public prosecutor must be given an opportunity to oppose the application and the Court should have 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. The twin conditions though restricts the right of accused to be released on bail but do not impose absolute restraint and the discretion vests in the Court. [1]

15. The first allegation levelled against the applicant is that he had extended invitations to Chinese nationals and during their stay in India, they committed the predicate offence by using forged licenses to open bank accounts and obtain DINs. There are also allegations of illegalities being committed in the Visa obtainment process by some of the Chinese nationals. Pertinently, none of the 30 Visas qua which the violation of Foreigners Act is alleged, were granted on invitation issued by applicant/Lava in 2013-2014.

The Prosecution Complaint in Table 5.1.22, which contains details of the 193 visas issued to Chinese nationals who had come in the context of Vivo India and its SDC's, at serial Nos. 16 and 17 notes that in the case of *Zhang Jie* and *Zhengshen Ou* i.e. the Chinese nationals who are alleged to have committed the scheduled offence, the Indian company stated to be involved in their visa process is GPICPL. Even though the Special Counsel for the respondent has time and again stressed on these allegations, no material proof has been brought to the attention of this Court to prove that

[1] Vijay Madanlal Choudhary v. Union of India, reported as 2022 SCC OnLine SC 929

the said two Chinese nationals had come to India on invitations sent by the applicant.

Moreover, admittedly, the invitation letters were issued between December 2013 to April 2014. The period of offence as per the FIR No. 190/2021 is 03.12.2014 to 13.12.2021, i.e. subsequent to the issuance of invitation letters. Nothing has been shown to prove that the applicant was aware that an offence was going to be committed on account of him extending the said invitations.

16. Second allegation levelled against the applicant is that the applicant had cumulatively, through Lava and his personal account, given Rs. 3.17 Crores to Labquest which acted as a front of the applicant and was instrumental in helping Vivo China set up business in India. It is alleged that for this, the applicant was paid by Vivo in the accounts of his overseas entities. Reliance has been placed on an email dated 23.07.2014 between CFO of Lava International Limited and CFO of Vivo China. However, learned Special Counsel has conceded that at this stage, there is no material on record to show that money was actually paid to any overseas entity of Lava.

Though respondent has contended that 4th option mentioned in the email dated 23.07.2014 was exercised to point to applicant's complicity but pertinently, the applicant had already remitted at least 5 tranches of loan to Labquest from January 2014- July 2014 i.e., much prior to the sending of the said email.

The applicant has claimed the said Rs. 3.17 Crores were given to Labquest as a loan from January 2014 to December 2014 and were in fact completely repaid to Lava by March 2015 with interest. Only around 20 odd

lac rupees remain to be returned to the applicant. In absence of any material on record showing receipt of any payment in overseas entity of Lava, the respondent will have to establish in trial whether any undue gain was received by the applicant in the aforesaid transaction.

17. Next, reliance was placed by the learned Special Counsel on email communication dated 30.06.2023 between the applicant and Jerome Chen and Luis, of Vivo India and WhatsApp chats between Jerome Chen and applicant dated 28.07.2023 to contend that the role of applicant is not only limited to helping Vivo in statutory compliance but he has continued to provide guidance to the other accused as to the ongoing criminal investigation. Special Counsel has argued that the period of conspiracy under Section 10 of the Evidence Act has continued till the aforesaid dates. Notably, the aforesaid communications are much after the registration of ECIR and filing of Prosecution Complaint. Even otherwise after going through the said communications, the contention raised being preposterous and meritless, is rejected.

18. It was next contended that due to the involvement of the applicant in a subsequent FIR, being FIR No. 234/2024, he has failed to satisfy the second part of Section 45 PMLA, which states that the accused is not likely to commit any offence while on bail. Pertinently, the said FIR has been registered under Sections 419/420/464/468/471/120-B of IPC and the word "any offence" mentioned in second part of Section 45 PMLA would mean an offence under the said Act and not any offence in general. It would be beneficial to keep in mind the view taken by the Supreme Court in respect to similar enactments.

The Supreme Court in the case of Nikesh Tarachand Shah v. Union of India, reported as **(2018) 11 SCC 1**, while discussing the import of Kartar Singh v. State of Punjab, reported as **(1994) 3 SCC 569,** with regard to Section 20(8) of the TADA Act, which is *pari materia* to Section 45 PMLA, observed as follows:-

> *47...Also, the offence that is spoken of in Section 20(8) is an offence under TADA itself and not an offence under some other Act. For all these reasons, the judgment in Kartar Singh [Kartar Singh v. State of Punjab, (1994) 3 SCC 569 : 1994 SCC (Cri) 899] cannot apply to Section 45 of the present Act.*

Similarly, Maharashtra Control of Organised Crime Act, 1999 also contains similar twin conditions in Section 21(4). While upholding the validity of the same, the Supreme Court in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra, reported as **(2005) 5 SCC 294** held as follows:-

> *"38. We are furthermore of the opinion that the restrictions on the power of the court to grant bail should not be pushed too far. If the court, having regard to the materials brought on record, is satisfied that in all probability he may not be ultimately convicted, an order granting bail may be passed. The satisfaction of the court as regards his likelihood of not committing an offence while on bail must be construed to mean an offence under the Act and not any offence whatsoever be it a minor or major offence. If such an expansive meaning is given, even likelihood of commission of an offence under Section 279 of the Penal Code may debar the court from releasing the accused on bail. A statute, it is trite, should not be interpreted in such a manner as would lead to absurdity. ..*
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> (emphasis added)

19. Considering the aforesaid, this Court records its *prima facie* satisfaction that the twin conditions as enumerated in Section 45 of the PMLA have been met in the present case.

20. At this juncture, and independent of the said conclusion, the Court also takes note of another important aspect of the case i.e., whether the trial is likely to be concluded in near future and if the answer is in negative, then

should this circumstance inure to the benefit of the accused. This aspect is to be seen in light of the period of incarceration and the nature of allegations.

21. Bail is the rule and jail is the exception. This principle is nothing but a crystallisation of the constitutional mandate enshrined in Article 21, which says that that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty is the usual course of action and deprivation of it a detour. The deprivation of liberty must only by procedure established by law, which should be fair and reasonable. Right of the accused to speedy trial is an important aspect which the Court must keep in contemplation when deciding a bail application as the same are higher sacrosanct constitutional rights, which ought to take precedence.

Section 45 of the PMLA while imposing additional conditions to be met for granting bail, does not create an absolute prohibition on the grant of bail. When there is no possibility of trial being concluded in a reasonable time and the accused is incarcerated for a long time, depending on the nature of allegations, the conditions under Section 45 of the PMLA would have to give way to the constitutional mandate of Article 21. What is a reasonable period for completion of trial would have to be seen in light of the minimum and maximum sentences provided for the offence, whether there are any stringent conditions which have been provided, etc. It would also have to be seen whether the delay in trial is attributable to the accused.[23]

[3] V. Senthil Balaji v. The Deputy Director, Directorate of Enforcement reported as 2024 INSC 739

22. In Senthil (Supra), the Supreme Court while reiterating the ratio enunciated in Union of India v. K.A. Najeeb (Three Judge bench)[3], also held that if the Constitutional Court comes to the conclusion that the trial would not be able to be completed in a reasonable time, the power of granting bail could be exercised on the grounds of violation of Part III of the Constitution of India notwithstanding the statutory provisions. It was held that:-

> *"21. Hence, the existence of a scheduled offence is sine qua non for alleging the existence of proceeds of crime. A property derived or obtained, directly or indirectly, by a person as a result of the criminal activity relating to a scheduled offence constitutes proceeds of crime. The existence of proceeds of crime at the time of the trial of the offence under Section 3 of PMLA can be proved only if the scheduled offence is established in the prosecution of the scheduled offence. Therefore, even if the trial of the case under the PMLA proceeds, it cannot be finally decided unless the trial of scheduled offences concludes. In the facts of the case, there is no possibility of the trial of the scheduled offences commencing in the near future. Therefore, we see no possibility of both trials concluding within a few years.*
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> *25…Inordinate delay in the conclusion of the trial and the higher threshold for the grant of bail cannot go together. It is a well settled principle of our criminal jurisprudence that "bail is the rule, and jail is the exception." These stringent provisions regarding the grant of bail, such as Section 45(1)(iii) of the PMLA, cannot become a tool which can be used to incarcerate the accused without trial for an unreasonably long time.*
> *xxx*
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> *27. Under the Statutes like PMLA, the minimum sentence is three years, and the maximum is seven years. The minimum sentence is higher when the scheduled offence is under the NDPS Act. When the trial of the complaint under PMLA is likely to prolong beyond reasonable limits, the Constitutional Courts will have to consider exercising their powers to grant bail. The reason is that Section 45(1)(ii) does not confer power on the State to detain an accused for an unreasonably long time, especially when there is no possibility of trial concluding within a reasonable time. What a reasonable time is will depend on the provisions under which the accused is being tried and other factors. One of the most relevant factor is the duration of the minimum and maximum sentence for the offence.*

[3] (2021) 3 SCC 713

> *Another important consideration is the higher threshold or stringent conditions which a statute provides for the grant of bail. Even an outer limit provided by the relevant law for the completion of the trial, if any, is also a factor to be considered. The extraordinary powers, as held in the case of K.A. Najeeb, can only be exercised by the Constitutional Courts. The Judges of the Constitutional Courts have vast experience. Based on the facts on record, if the Judges conclude that there is no possibility of a trial concluding in a reasonable time, the power of granting bail can always be exercised by the Constitutional Courts on the grounds of violation of Part III of the Constitution of India notwithstanding the statutory provisions. The Constitutional Courts can always exercise its jurisdiction under Article 32 or Article 226, as the case may be. The Constitutional Courts have to bear in mind while dealing with the cases under the PMLA that, except in a few exceptional cases, the maximum sentence can be of seven years. The Constitutional Courts cannot allow provisions like Section 45(1)(ii) to become instruments in the hands of the ED to continue incarceration for a long time when there is no possibility of a trial of the scheduled offence and the PMLA offence concluding within a reasonable time. If the Constitutional Courts do not exercise their jurisdiction in such cases, the rights of the undertrials under Article 21 of the Constitution of India will be defeated. In a given case, if an undue delay in the disposal of the trial of scheduled offences or disposal of trial under the PMLA can be substantially attributed to the accused, the Constitutional Courts can always decline to exercise jurisdiction to issue prerogative writs. An exception will also be in a case where, considering the antecedents of the accused, there is every possibility of the accused becoming a real threat to society if enlarged on bail. The jurisdiction to issue prerogative writs is always discretionary."*
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> (emphasis added)

23. The issue of long incarceration and right of speedy trial also cropped up in Manish Sisodia v Directorate of Enforcement,[4] wherein it has been held by the Supreme Court that the right to bail in cases of delay in trial, coupled with long period of incarceration would have to be read into the Section 439 CrPC as well as Section 45 of PMLA while interpreting the said provisions.

> *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*

[4] Manish Sisodia v Directorate of Enforcement, reported as 2024 SCC OnLine SC 1920

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.

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49. We find that, on account of a long period of incarceration running for around 17 months and the trial even not having been commenced, the appellant has been deprived of his right to speedy trial.

50. As observed by this Court, the right to speedy trial and the right to liberty are sacrosanct rights. On denial of these rights, the trial court as well as the High Court ought to have given due weightage to this factor.

24. Prem Prakash v. Union of India through the Directorate of Enforcement,[5] is another recent decision where it has been reiterated that the fundamental right enshrined under Article 21 cannot be arbitrarily subjugated to the statutory bar in Section 45 of the Act and the constitutional mandate being the higher law, the right to speedy trial must be ensured and if the trial is being delayed for reasons not attributable to the accused, his

[5] Prem Prakash v. Union of India through the Directorate of Enforcement, reported as 2024 SCC OnLine SC 2270

incarceration should not be prolonged on that account. The relevant extract of the said judgement is enacted below for convenience:-

> *"11….All that Section 45 of PMLA mentions is that certain conditions are to be satisfied. The principle that, "bail is the rule and jail is the exception" is only a paraphrasing of Article 21 of the Constitution of India, which states that no person shall be deprived of his life or personal liberty except according to the procedure established by law. Liberty of the individual is always a Rule and deprivation is the exception. Deprivation can only be by the procedure established by law, which has to be a valid and reasonable procedure. Section 45 of PMLA by imposing twin conditions does not re-write this principle to mean that deprivation is the norm and liberty is the exception. As set out earlier, all that is required is that in cases where bail is subject to the satisfaction of twin conditions, those conditions must be satisfied.*
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> *12. Independently and as has been emphatically reiterated in Manish Sisodia (II) (supra) relying on Ramkripal Meena v. Directorate of Enforcement (SLP (Crl.) No. 3205 of 2024 dated 30.07.2024) and Javed Gulam Nabi Shaikh v. State of Maharashtra, 2024 SCC OnLine SC 1693, where the accused has already been in custody for a considerable number of months and there being no likelihood of conclusion of trial within a short span, the rigours of Section 45 of PMLA can be suitably relaxed to afford conditional liberty. Further, Manish Sisodia (II) (supra) reiterated the holding in Javed Gulam Nabi Sheikh (Supra), that keeping persons behind the bars for unlimited periods of time in the hope of speedy completion of trial would deprive the fundamental right of persons under Article 21 of the Constitution of India and that prolonged incarceration before being pronounced guilty ought not to be permitted to become the punishment without trial. In fact, Manish Sisodia (II) (Supra) reiterated the holding in Manish Sisodia (I) v. Directorate of Enforcement (judgment dated 30.10.2023 in Criminal Appeal No. 3352 of 2023) where it was held as under:—*
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> > *"28. Detention or jail before being pronounced guilty of an offence should not become punishment without trial. If the trial gets protracted despite assurances of the prosecution, and it is clear that case will not be decided within a foreseeable time, the prayer for bail may be meritorious. While the prosecution may pertain to an economic offence, yet it may not be proper to equate these cases with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, kidnaping for ransom, mass*

> *violence, etc. Neither is this a case where 100/1000s of depositors have been defrauded. The allegations have to be established and proven. 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 of the Code and Section 45 of the PML Act. The reason is 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. When the trial is not proceeding for reasons not attributable to the accused, the court, unless there are good reasons, may well be guided to exercise the power to grant bail. This would be truer where the trial would take years."*
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> *It is in this background that Section 45 of PMLA needs to be understood and applied. Article 21 being a higher constitutional right, statutory provisions should align themselves to the said higher constitutional edict."*
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> (emphasis added)

25. The view taken in the Manish Sisodia and Prem Prakash cases (Supra) was reiterated recently by the Supreme Court in the case of Vijay Nair v. Directorate of Enforcement,[6] where it was held that liberty guaranteed under Article 21 of the Constitution does not get abrogated. It was held that:-

> *"12. Here the accused is lodged in jail for a considerable period and there is little possibility of trial reaching finality in the near future. The liberty guaranteed under Article 21 of the Constitution does not get abrogated even for special statutes where the threshold twin bar is provided and such statutes, in our opinion, cannot carve out an exception to the principle of bail being the rule and jail being the exception. The cardinal principle of bail being the rule and jail being the exception will be entirely defeated if the petitioner is kept in custody as an under-trial for such a long duration. This is particularly glaring since in the event of conviction, the maximum sentence prescribed is only 7 years for the offence of money laundering."*

26. On similar lines, is the decision of Supreme Court, in Sunil Dammani v. Directorate of Enforcement[7], where considering the one-year custody of

[6] Vijay Nair v. Directorate of Enforcement, [6]decided on 02.09.2024 in SLP (Crl) Diary No. 22137/2024
[7] Criminal Appeal No. 4108/2024 decided on 03.10.2024

the accused and the factum of investigation being complete, the bail was granted noting that the prosecution had cited 98 witnesses.

27. The right to speedy trial was also upheld and other special legislations where provisions akin to Section 45 PMLA exist. Notable ones being, the decision in the case of Javed Gulam Nabi Shaikh v. State of Maharashtra[8], wherein Supreme Court while granting bail to an accused under UAPA, observed as under:-

> *"19. If the State or any prosecuting agency including the court concerned has no wherewithal to provide or protect the fundamental right of an accused to have a speedy trial as enshrined under Article 21 of the Constitution then the State or any other prosecuting agency should not oppose the plea for bail on the ground that the crime committed is serious. Article 21 of the Constitution applies irrespective of the nature of the crime."*
>
> *(Emphasis added)*

On similar lines is the case of Union of India v. K.A. Najeeb (Supra), wherein the Supreme Court held as under:-

> *"12. Even in the case of special legislations like the Terrorist and Disruptive Activities (Prevention) Act, 1987 or the Narcotic Drugs and Psychotropic Substances Act, 1985 ("the NDPS Act") which too have somewhat rigorous conditions for grant of bail, this Court in Paramjit Singh v. State (NCT of Delhi) [Paramjit Singh v. State (NCT of Delhi), (1999) 9 SCC 252 : 1999 SCC (Cri) 1156] , Babba v. State of Maharashtra [Babba v. State of Maharashtra, (2005) 11 SCC 569 : (2006) 2 SCC (Cri) 118] and Umarmia v. State of Gujarat [Umarmia v. State of Gujarat, (2017) 2 SCC 731 : (2017) 2 SCC (Cri) 114] enlarged the accused on bail when they had been in jail for an extended period of time with little possibility of early completion of trial. The constitutionality of harsh conditions for bail in such special enactments, has thus been primarily justified on the touchstone of speedy trials to ensure the protection of innocent civilians.*
>
> *15. This Court has clarified in numerous judgments that the liberty guaranteed by Part III of the Constitution would cover within its protective ambit not only due procedure and fairness but also access to justice and a speedy trial. In Supreme Court Legal Aid Committee (Representing*

[8] 2024 SCC OnLine SC 1693

Undertrial Prisoners) v. Union of India [Supreme Court Legal Aid Committee (Representing Undertrial Prisoners) v. Union of India, (1994) 6 SCC 731, para 15 : 1995 SCC (Cri) 39] , it was held that undertrials cannot indefinitely be detained pending trial. Ideally, no person ought to suffer adverse consequences of his acts unless the same is established before a neutral arbiter. However, owing to the practicalities of real life where to secure an effective trial and to ameliorate the risk to society in case a potential criminal is left at large pending trial, the courts are tasked with deciding whether an individual ought to be released pending trial or not. Once it is obvious that a timely trial would not be possible and the accused has suffered incarceration for a significant period of time, the courts would ordinarily be obligated to enlarge them on bail.

17. It is thus clear to us that the presence of statutory restrictions like Section 43-D(5) of the UAPA per se does not oust the ability of the constitutional courts to grant bail on grounds of violation of Part III of the Constitution. Indeed, both the restrictions under a statute as well as the powers exercisable under constitutional jurisdiction can be well harmonised. Whereas at commencement of proceedings, the courts are expected to appreciate the legislative policy against grant of bail but the rigours of such provisions will melt down where there is no likelihood of trial being completed within a reasonable time and the period of incarceration already undergone has exceeded a substantial part of the prescribed sentence. Such an approach would safeguard against the possibility of provisions like Section 43-D(5) of the UAPA being used as the sole metric for denial of bail or for wholesale breach of constitutional right to speedy trial."

(Emphasis added)

Taking note of above decision, in the case of Sk. Javed Iqbal v. State of U.P.,[9] the Supreme Court held that:-

"42. This Court has, time and again, emphasised that right to life and personal liberty enshrined under Article 21 of the Constitution of India is overarching and sacrosanct. A constitutional court cannot be restrained from granting bail to an accused on account of restrictive statutory provisions in a penal statute if it finds that the right of the accused-undertrial under Article 21of the Constitution of India has been infringed. In that event, such statutory restrictions would not come in the way. Even in the case of interpretation of a penal statute, howsoever stringent it may be, a constitutional court has to lean in favour of constitutionalism and the rule of law of which liberty is an intrinsic part. In the given facts of a particular case, a constitutional court may decline to grant bail. But it would be very

[9] (2024) 8 SCC 293

wrong to say that under a particular statute, bail cannot be granted. It would run counter to the very grain of our constitutional jurisprudence. In any view of the matter, K.A. Najeeb [Union of India v. K.A. Najeeb, (2021) 3 SCC 713] being rendered by a three-Judge Bench is binding on a Bench of two Judges like us."

(Emphasis added)

To the similar extent are the decisions in Mohd. Muslim alias Hussain v State (NCT of Delhi[10], Jitendra Jain v. Narcotics Control Bureau[11], Rabi Prakash *v.* State of Odisha[12] and Man Mandal and Anr. *v.* State of West Bengal[13], wherein while taking into account the prolonged custody and unlikelihood of completion of trial in immediate future, the accused was granted bail.

28. Examining the present case in the aforenoted backdrop, it is noted that the investigation was initiated in the year 2022 and the Prosecution Complaint has named 48 accused persons and cited 527 witnesses. There are 80,000 pages of documents which need to be analysed. A supplementary Prosecution Complaint dated 19.02.2024 has also been filed as per which the number of accused has increased to 53, 15 additional witnesses have been cited and an additional 3500 pages of documents have been placed on record.

29. In a situation such as the present case, where there are multiple accused persons, thousands of pages of evidence to assess, scores of witnesses to be examined and the trial is not expected to end anytime in the near future and the delay is not attributable to the accused, keeping the accused in custody by using Section 45 PMLA a tool for incarceration or as

[10] 2023 SCC OnLine SC 352
[11] 2022 SCC OnLine SC 2021
[12] 2023 SCC OnLine SC 1109
[13] 2023 SCC OnLine SC 1868

a shackle is not permissible. Liberty of an accused cannot be curtailed by Section 45 without taking all other germane considerations into account. It is also pertinent to bear in mind while dealing with the cases under the PMLA that, except in a few exceptional cases, the maximum sentence can be of seven years. The accused in a money laundering case cannot be equated with those punishable with death, imprisonment for life, ten years or more like offences under the Narcotic Drugs and Psychotropic Substances Act, 1985, murder, cases of rape, dacoity, etc.

As held in the catena of judgements discussed hereinabove, Constitutional Courts have the power to grant bails on the grounds of violation of Part III of the Constitution and Section 45 does not act as a hindrance to the same. The sacrosanct right to liberty and fair trial is to be protected even in cases of stringent provisions present in special legislations.

30. The applicant has been in custody since 10.10.2023 and the trial is at the stage supply of documents under Section 207 Cr.P.C. and charges are yet to be framed. Out of the 7 accused persons who were arrested, arrest of 3 persons was declared illegal by the Trial Court vide order dated 30.12.2023 and the other three, as noted above, have already been released on bail.

31. Considering the totality of the facts and circumstances, the fact that the twin conditions under Section 45 of PMLA stand satisfied, the fact that the all the other accused persons who were arrested are out on bail, the period of custody undergone, the trial is at nascent stage of supply of documents under Section 207 Cr.P.C., keeping in mind the import of the catena of decisions of Supreme Court discussed hereinabove, it is directed that the applicant be released on regular bail subject to him furnishing personal bond in the sum of Rs.1,00,000/- with one surety of the like amount

each to the satisfaction of the concerned Jail Superintendent/Trial Court/Duty J.M./link J.M. and subject to the following further conditions: -

i) The applicant shall not leave Delhi/NCR without prior permission of the concerned Court and surrender his passport, if any, if not already done.

ii) The applicant shall provide his mobile number to the Investigating Officer on which he will remain available during the pendency of the trial.

iii) In case of change of residential address or contact details, the applicant shall promptly inform the same to the concerned Investigating Officer as well as to the concerned Court.

iv) The applicant shall not directly/indirectly try to get in touch with the prosecution witnesses or tamper with the evidence.

v) The applicant shall regularly appear before the concerned Court during the pendency of the proceedings.

32. The bail application is disposed of in the above terms alongwith the pending application.

33. Copy of the order be communicated to the concerned Jail Superintendent electronically for information.

34. Copy of the order be uploaded on the website forthwith.

35. Needless to state that this Court has not expressed any opinion on the merits of the case and has made the observations only with regard to present bail application and nothing observed hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial

of the case as the same has been expressed only for the purpose of the disposal of the present bail application.

MANOJ KUMAR OHRI
(JUDGE)

NOVEMBER 20, 2024/ry