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AJAY KUMAR KUHAR
Special Judge (PC Act) CBI-09
Court No. 502, Fifth Floor
Rouse Avenue Court Complex
New Delhi

IN THE COURT OF SH. AJAY KUMAR KUHAR, ADDITIONAL SESSIONS JUDGE / SPECIAL JUDGE (PC ACT), CBI-09, ROUSE AVENUE COURT COMPLEX, NEW DELHI

ECIR No.7/HIU/2017

ED vs INX Media (P) Ltd.

13.9.2019

ORDER

1. By this order, I shall dispose off the application on behalf of Sh. P. Chidambaram praying to surrender before this court in ECIR No.7/HIU/2017.

2. The applicant was produced in custody on 05.9.2019 in RC No.220 2017/E 0011/CBI/EOU-IV/EO-II, CBI in case titled as CBI vs. M/s INX Media (P) Ltd. & Ors. and was remanded to Judicial custody. On the same day, this application was moved stating inter-alia, that his anticipatory bail application in ECIR No.7/HIU/2017 was dismissed by the Hon'ble High Court vide order dated 20.8.2019. The said order was challenged before the Hon'ble Supreme Court in SLP (Crl.) No.7523/2019 which was also dismissed on 05.9.2019. Therefore, the applicant wish to surrender in the court in the abovesaid ECIR.

3. The notice of this application was issued to the Directorate of

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Enforcement (hereinafter 'ED').

4. Today, the reply to the application has been filed. Copy supplied to the learned counsel for the applicant.

5. It is stated in the reply that presently the ED is completing investigation pertaining to some aspect of money laundering which are required to be gone into before an effective and meaning custodial interrogation of the applicant can take place. It is stated that since 06.9.2019, six persons have been summoned for interrogation, out of them, three are under interrogation which is still going on.

6. It is submitted that only after the aforesaid background investigation is completed, the interrogation of the applicant would be meaningful. It is further submitted that since the applicant is in judicial custody, he is not in a position to tamper evidence or hamper investigation. The ED will seek the arrest of the applicant at an appropriate time to utilize the permissible period of 15 days for custodial interrogation. It is also submitted that it is the right of investigating agency to take a decision in the interest of effective investigation as to when the accused is to be arrested.

7. I have heard the arguments of Sh. Kapil Sibal, Learned Sr. Advocate for applicant with Sh. Arshdeep Singh, learned counsel and Sh. Tushar Mehta, Learned Solicitor General for ED with Sh. Amit Mahajan, learned Special Counsel for ED.

8. The learned SG has argued that the ground for arrest of the

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accused as per Section 19 of PML Act do exist but since the ED is at the crucial stage of investigation on some aspect of money laundering, therefore, not inclined to arrest the applicant at this stage. He argued that after the interrogation of the persons who have joined the investigation since 06.9.2019, is complete only then the custodial interrogation of the applicant will be required. He also argued that simply because the anticipatory bail application of the applicant has been dismissed does not mean that the ED is bound to arrest the applicant forthwith.

9. He argued that the Investigating Agency has to decide the method and manner of investigation in which the court has no role. It is further submitted that the investigating agency has the statutory right to investigate a cognizable offence without any authority from Magistrate/Court and the court are not vested with the power to interfere with the exercise of that statutory right.

10. He has referred to the judgments in King Emperor vs. Khwaja Nazir Ahmed, 1994 SCC Online PC 29, Abhinandan vs. Dinesh Mishra, AIR 1968 SC 117, State of Bihar vs. J.A.C. Saldana (1980) 1 SCC 554, MC Abraham vs State of Maharashtra (2003) 2 SCC 649 and Sarif Ahmad vs. State (NCT of Delhi) (2009) 14 SCC 184.

11. The learned counsel for the applicant has argued that ED was pressing for the arrest of the applicant after having an order under Section 19 of PML Act and before the Hon'ble Supreme Court in the

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SLP of the applicant challenging the dismissal of his anticipatory bail application by the Hon'ble High Court, an affidavit was filed by CBI giving reasons to justify the arrest of the applicant and emphasizing the need for custodial interrogation. Now, when the applicant wants to surrender the ED is opposing on the ground that custody is not required at this stage. He argued that the applicant being an accused can surrender before the court at any time and thereafter, he will be deemed to be in judicial custody.

12. He further argued that the purpose behind the stand taken by the ED now is to harass the applicant and to prolong his incarceration one way or the other. He argued that if the arrest of the applicant is necessary why he cannot be taken into custody now? He further argued that the ground taken by the ED that they are interrogating some persons as of now is just a plank to avoid the arrest of the applicant. The learned counsel submitted that the applicant wish to surrender and therefore, he should be taken into custody in the present case.

13. He refers to the judgment of the Hon'ble Supreme Court in Niranjan Singh & Ors. vs. Prabhakar Raja Ram Kharote (1980) 2 SCC 559 and also on In re: Dijendra Shankar Das 1982 SCC Online Cal 181. The reliance on these judgments was in support of the submission that when an accused surrenders in court, if wanted in any case, his surrender would be considered as "Custody" in the court.

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14. The learned SG has argued that there is no change in the facts and the "reason to believe" to arrest the accused still exist but the investigating agency cannot be directed to arrest the accused at any particular point of time. The ED is collecting further material to confront the applicant and therefore, the custodial interrogation would be sought after his arrest at appropriate stage. With regard to the judgment in Niranjan Singh (supra) case he submitted that it was in different factual context where a complaint case was before the Magistrate in which the enquiry under Section 202 Cr.PC was already conducted and the Magistrate had issued NBW to secure the presence of accused. He submitted that there is no ground for moving this application by the applicant and it should be dismissed.

15. There is no dispute with the proposition that investigation is the exclusive right of the investigating agency. The arrest of an accused is also a part of investigation. The investigating agency has to decide when to arrest a person. Section 41 Cr.PC provides that any police officer "may" arrest a person who commits a cognizable offence in his presence or against whom a complaint has been made or credible information has been received or reasonable suspicion exist that he has committed a cognizable offence which is punishable upto seven years of imprisonment. This provision gives a discretionary power to a police officer to arrest an accused and he is not bound to arrest any such person even if there is an offence of the nature mentioned in the

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provision.

16. In the case M.C. Abraham vs. State of Maharashtra (supra), it was observed that mere fact that the bail application of an accused has been dismissed is no ground for directing his immediate arrest. At investigation stage, the IO may make up his mind whether it is necessary to arrest the accused, and at this stage, court has no role to play.

17. Thus, it would be wrong to assume that if application for anticipatory bail has been rejected there is no option but to arrest the applicant forthwith. The position of law is settled that the investigation is the prerogative of investigating agency. Thus, in the matter which are in the domain of the investigating agency exclusively, the interference from the court is to be avoided.

18. The judgment of the Hon'ble Supreme Court in the case of Niranjan Singh (supra) was in different background. In that case, the complaint was filed against an accused in which after an enquiry under Section 202 Cr.PC and taking other evidence of witnesses, the Magistrate formed a view that there are sufficient grounds to proceed against all the accused for the offences under Section 302/323/342 readwith Section 34 IPC and NBW was issued for the production of the accused. So it was the case where a complaint was pending before the court of which cognizance was already taken and in such a situation if an accused appears or surrender before the court then he

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has to be taken into custody or granted bail. In the case of In re: Dijendra Shankar Das (supra) also the matter was pending before the court when the accused appeared and sought the bail.

19. In the case before us, neither a complaint nor the charge-sheet is pending before this court. At the stage of investigation, when the investigating agency is not inclined to arrest the accused and there is no process issued against the accused by the court, the surrender by an accused in the court will not ipso facto be accepted by court and he will be deemed to be in custody of court. In the case of Bishnu Malik vs. State of Orissa, 1993 Cri. LJ 3817, it was observed "it is however another thing to say that on the filing of the surrender application the court must be of necessity be deemed to have taken custody. There is no warrant for such proposition".

20. An accused when taken into custody can be remanded either to police custody or judicial custody under Section 167 Cr.PC or he can be remanded to custody under Section 309 (2) Cr.PC, when the court has taken cognizance of the offence or has commenced the trial. The remand under Section 167 Cr.PC has a pre-condition of arrest under Section 41 Cr.PC and the production of the accused before court under Section 56 Cr.PC. Section 57 Cr.PC provides that a person arrested cannot be detained for more than 24 hours in the absence of an order under Section 167 Cr.PC. So custody of an accused at investigation stage beyond the 24 hours, after arrest shall be governed by Section

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167 Cr.PC.

21. However, in the present case, the applicant has not been arrested nor this court has taken cognizance of any offence on any complaint or charge-sheet. Therefore, the applicant cannot be remanded to custody either under Section 167 Cr.PC or under Section 309 (2) Cr.PC. Further, the applicant had only moved an application to surrender, he was not taken into custody in this case. There is not even a notional surrender because the court has not taken applicant into custody in this case though he happens to be in custody in other case RC No.220 2017 E 0011.

22. When the investigating officer is not willing to arrest the applicant at this stage his application for surrender in the court cannot be entertained for the reasons given above.

23. The application is accordingly dismissed.

24. Copy of the order be given dasti to the parties, if so requested.

— sd/ —

Announced in the open court on 13.9.2019

(AJAY KUMAR KUHAR)
Special Judge (PC Act), CBI-09,
RACC, New Delhi : 13.9.2019 (SR)

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