

Directorate of Enforcement v. Luo Sang @ Charlie Peng
ECIR/DLZO-II/01/2021
U/s 3 & 4 PMLA

23.07.2021

Present: Mohammad Faraz, Ld. SPP for ED through VC.

Sh. Amit Sagar, AD, PMLA present through VC.

Sh. Vikas Pahwa, Ld. Senior Advocate with Sh. Sumer Singh Boperai, Sh. Shadman Ahmed Siddiqui, Sh. Lavkesh Bhamhani, Syed Arham Masud, Sh. Abhishek Pati and Sh. Kartik Sabharwal, Ld. counsel for applicant/accused through VC.

Proceedings done through video conferencing.

It is certified that link was working properly and no grievance was agitated by either of the counsel in this regard.

1. Present is an application u/s 439 CrPC r/w Section 46(1)/65 PMLA moved on behalf of applicant/accused Luo Sang @ Charlie Peng for grant of regular bail. It is submitted that charge-sheet has already been filed in the present case and hence, no fruitful purpose would be served by keeping him behind the bars; applicant/accused is languishing in j.c for about 175 days; the evidences in the present case are documentary in nature which is already in the possession of the department and trial in the instant matter is likely to consume considerable time and there is no likelihood that applicant may attempt to influence the witnesses. It is submitted that the bar u/s 45 PMLA is not applicable in the instant case stricto sensu as per the judgment in the matter of **Sai Chandrashekhar v. Directorate of Enforcement 2021 SCC OnLine Delhi 1081** and **Dr. Vinod Bhandari v. Asstt. Director, 2018 SCC OnLine MP 1559**.
2. It is submitted that applicant/accused is married to an Indian lady having one child and hence he is not at flight risk and satisfies the triple test laid down in **P. Chidambaram v. Directorate of Enforcement (2019) 9 SCC 24**. It is submitted that investigation in the present case has been conducted partially with a malafide

intention to protect the kingpins Manoj Dudeja and Akshay Taneja, who are allegedly running the hawala transaction of crores of rupees; there is nothing on record to prove that the applicant/accused has any involvement in the alleged offence.

3. It is further submitted that applicant/accused has been running companies, namely, OTA New Delhi Pvt Ltd purchased in 2019 and Fin Black Rock (India) Pvt Ltd purchased in 2018 and have been legally incorporated on the basis of genuine documents; these companies were doing legitimate business of custom clearance and consultancy business and are not indulged in any kind of illegal business as alleged by the department. It is submitted that Section 24 of PMLA is not applicable at the time of granting bail and the judgment Union of India v. Hassan Ali Khan & Anr (2011) 10 SC 235 is not applicable to the present case and infact as has been held by Chhatisgarh High Court in the matter of *Anil Tuteja v. The Director, Directorate of Enforcement M. Cr.C. (A) NO. 469 of 2020*, the reverse burden of proof apropos Section 24 of PMLA will only lie on applicant after framing of charge. It is submitted that applicant/accused satisfies the triple test for grant of bail; he is not at flight risk; he was granted bail in FIR No. 110/2018 vide order dated 22.10.2018, he remained on bail for two years and never misused the liberty granted to him.
4. It is further submitted that the dicta of Hon'ble Apex Court in *Arnesh Kumar v. State of Bihar and & Anr (2014) 8 SCC 273* and *Joginder Singh v. State AIR 2014 8 SCC* is squarely applicable to the present bail application as according to Section 65 of PMLA provisions of CrPC are applicable to proceedings ensuing out of PMLA.
5. It is further submitted that despite six months of investigation, the source of funds arising through shell companies is still not known and it is also not known if the amount transferred by shell companies qualify as proceeds of crime u/s 2 (1)(u) PMLA.
6. In support of his submissions, Ld. Counsel has placed reliance upon

the judgment in the matter of *Sahid Hossain Biswas v. State of West Bengal* 2017 OnLine Cal 5023, *Babu v. State of Kerala* (2010) 9 SCC 189, *State of Maharashtra v. Dnyaneshwar Laxman Rao Wankhede* (2009) 15 SCC 200 and *Anand Kumar v. State of M.P* (2009) 3 SCC 799.

7. Ld. SPP for Directorate of Enforcement (hereinafter referred to as 'ED') has vehemently opposed the bail application arguing that applicant/accused is a Chinese national who came to India illegally via Nepal; he started residing in Delhi from where he applied for passport on the basis of forged and fabricated PAN card and Aadhar Card but his application was rejected. It is submitted that during this period, he married an Indian girl from Manipur and then he succeeded in getting passport from Manipur. It is submitted that on the basis of these false and fabricated documents, he incorporated M/s Sunhara Bird Pvt. Ltd. It is submitted that applicant/accused is at a flight risk and if he is released on bail, he may leave India.

8. It is submitted that during investigation, applicant/accused alongwith his business partner Li Zhenghua @ Cartar Lee was found to be involved in the offence of money laundering and was arrested on 15.01.2021 in the present matter. It is submitted that investigation qua the applicant/accused is not complete; certain material witnesses are yet to be examined; investigation with regard to certain individuals and entities including those of the applicant/accused is still ongoing to derive the end use and the last mile connectivity of the money trail as the investigation is solely not based on the documentary evidence. It is submitted that there are 151 entities identified so far and this fact in itself indicate high propensity of accused to influence the investigation since his dealing with these entities is in his express personal knowledge and interference by him is likely to make the persons running such entities unavailable for investigation and if applicant/accused is enlarged on bail, there is every likelihood that he may hamper the fair course of investigation.

9. It is further submitted by Ld. SPP that there is statutory bar u/s 45 of PMLA as two threshold conditions prescribed u/s 45 of PMLA are mandatory to be followed and accordingly, the instant bail application deserves to be dismissed. It is further submitted that applicant/accused alongwith his associates was indulged in the commission of grave economic offence, hence, he does not deserve to be released on bail. It is further submitted that as per the provisions of Section 24 of PMLA, the burden lies upon the accused to prove that that he is not involved in any money laundering case.
10. In support of his submissions, Ld. SPP has relied upon judgment in the matter of *Assistant Director v. Chunni Lal Gaba* CRM-M-14336-2020 decided on 02.07.2020, *Union of India v. Hassan Ali Khan & Anr* (2011) 10 SC 235, *Mohammad Arif v. Directorate of Enforcement, Govt. of India* 2020 SCC OnLine Ori 544, *Y. S. Jagan Mohan Reddy v. CBI* (2013) 7 SCC 439, *Vidyut Kumar Sarkar @ Ashok Das v. State of Bihar & ors* C. M No. 73325/2019 decided on 18.06.2020, *P. Chidambaram v. Directorate of Enforcement* (2019) 9 SCC 24, *State of Karnataka & Ors v. Karnataka Pawn Brokers Association & Ors* (2018) 6 SCC 363, *Sunil Dahiya v. State* 2016 SCC OnLine Del 5566, *Directorate of Enforcement v. Upendra Rai* SLP (Crl) Diary No(s) 5150/2020, *Rohit Tandon v. Directorate of Enforcement* (2018) 11 SCC 46, *Serious Fraud Investigation Office v. Nittin Johari & Anr* (2019) 9 SCC 165, *Directorate of Enforcement thru Deputy Director v. Shivinder Mohan Singh* Petition(s) for Special Leave to Appeal (Crl.) No(s) 3474/2020, *Nimmagadda Prasad v. Central Bureau of Investigation* (2013) 7 SCC 466, *Karunakaran Ramchand v. Economic Offence Wing* Bail Application no. 2819/2020 decided on 15.12.2020 and order dated 23.06.2021 passed by Sh. Vikas Dhull, Special Judge (PC Act) in ECIR No. DLZO-1/43/2021 titled *Directorate of Enforcement v. Amarendra Dhari Singh*.
11. I have heard and considered the rival submissions made by both the parties and also carefully gone through the material available on record.

12. Ld. Special PP for ED is primarily opposing the bail application on the following three counts:

A. Statutory bar u/s 45 of PMLA :-

13. It is forcefully argued by Ld. SPP that two threshold conditions prescribed u/s 45 of PMLA are required to be mandatorily satisfied. It is submitted that considering the statutory bar u/s 45 of PMLA, the instant application deserves to be dismissed.

14. However, recently in the case of **Sai Chandrashekhar v. Directorate of Enforcement 2021 SCC OnLine Delhi 1081**, it has been observed as under :-

'17. Twin conditions mentioned in Section 45 of the PML Act continue to be struck down as being unconstitutional in view of the judgment of the Apex Court in the case of Nimesh Tarachand Shah vs. Union of India (2018) 11 SCC 1. The amendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term 'offence punishable for 3 years' with 'offence under this Act'. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment.

18. Since the twin conditions for bail in section 45 of the PML Act have been struck down by the Hon'ble Supreme Court and the same are neither revived nor resurrected by the Amending Act therefore, as of today there is no rigor of said two conditions under original Section 45(l)(ii) of the PML Act for releasing the Petitioner on bail. The provisions of section 439 of Cr.P.C and the conditions therein will only apply in the case of the Petitioner for grant of bail.'

15. It has been specifically observed by Hon'ble Delhi High Court in the matter of *Sai Chandrashekhar (supra)*, that rigors of Section 45 of PMLA would not apply while considering the application for bail and the present bail application is accordingly required to be decided upon the touchstone of Section 439 CrPC. No contrary binding precedent of any larger bench or of Hon'ble Apex Court has been brought to my notice by Ld. SPP for ED.

Consequently, I have no hesitation in observing that the reliance upon Section 45 of PMLA by Ld. SPP in the case at hand is

misplaced.

B. Economic Offence :-

16. It is forcefully argued by Id. SPP for ED that the case at hand constitutes a serious economic offence and bail should not be granted in grave economic offences. It is thus prayed that the application deserves to be dismissed.

17. Right of Bail is infact a statutory recognition of sacrosanct principle of Presumption of Innocence. There is no rule of law or prudence which warrants that in economic offence cases bail cannot be granted at all.

18. In this regard, reference may be made to the observations of the Hon'ble Supreme Court in **P. Chidambaram v. Directorate of Enforcement (2020) 13 SCC 791** wherein it was observed as under:

“23. Thus from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of “grave offence” and in such circumstance while considering the application for bail in such matters, the Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. **In that regard what is also to be kept in perspective is that even if the allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides so.** Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case to case basis on the facts involved therein and securing the presence of the accused to

stand trial...” (emphasis supplied)

19. Therefore, in light of the mandate of Hon'ble Apex Court in **P. Chidambaram v. Directorate of Enforcement (2020) 13 SCC 791** (*supra*), it is evident that the provisions of bail are equally applicable to the economic offenders. Thus, I do not find any merits in the said contention of Ld. SPP for ED.

C. Burden of proof upon accused u/s 24 of PMLA :-

20. It is forcefully argued by Ld. SPP that as per the provisions of Section 24 of PMLA, burden lies upon the accused to prove that he is not involved in money laundering and as the applicant/accused has failed to discharge the statutory onus placed upon him, the bail application deserves to be dismissed.

On the contrary, Ld. Senior Advocate for applicant/accused has forcefully argued that Section 24 of PMLA can only be invoked once the essential foundation for invocation of the said statutory presumption is laid down by the prosecution. It is additionally argued that the onus would be placed upon the accused only after framing of the charge and not at the stage of bail.

It is pointed out by Ld. Senior Advocate that in the charge-sheet as well as in the reply filed by the ED, it is evident that the source of the money, alleged to be 'proceeds of crime', is still under investigation. It is submitted that for invocation of the provisions of PMLA, 'proceeds of crime', as defined u/s 2 (u) of PMLA, is the sine qua non. It is submitted that since it is neither alleged nor proved that the alleged money transaction is connected with any crime, the offence of money laundering cannot be presumed and Section 24 of PMLA cannot be invoked against the applicant/accused.

21. In order to appreciate the rival contentions it would be worthwhile to reproduce the relevant statutory provisions. The offence of Money Laundering is statutorily defined under Section 3 of PMLA which reads as under :-

Section 3. Offence of money-laundering.—Whosoever directly or indirectly attempts to indulge or knowingly assists or knowingly is a

party or is actually involved in any process or activity connected with the **[proceeds of crime]** including its concealment, possession, acquisition or use and projecting or claiming] it as untainted property shall be guilty of offence of money-laundering.

[*Explanation.*—For the removal of doubts, it is hereby clarified that,—

(i) a person shall be guilty of offence of money-laundering if such person is found to have directly or indirectly attempted to indulge or knowingly assisted or knowingly is a party or is actually involved in one or more of the following processes or activities connected with proceeds of crime, namely:—

(a) concealment; or

(b) possession; or

(c) acquisition; or

(d) use; or

(e) projecting as untainted property; or

(f) claiming as untainted property,

in any manner whatsoever;

(ii) the process or activity connected with proceeds of crime is a continuing activity and continues till such time a person is directly or indirectly enjoying the proceeds of crime by its concealment or possession or acquisition or use or projecting it as untainted property or claiming it as untainted property in any manner whatsoever.]

The term 'proceeds of crime' has been statutorily defined u/s 2 (1) (u) of PMLA which is reproduced here as under for ready reference:-

“...Section 2 (1) (u) “**proceeds of crime**” means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property [or where such property is taken or held outside the country, then the property equivalent in value held within the country] [or abroad]; [Explanation.—For the removal of doubts, it is hereby clarified that "proceeds of crime" include property not only derived or obtained from the scheduled offence but also any property which may directly or indirectly be derived or obtained as a result of any criminal activity relatable to the scheduled offence...”

22.I concur with the Ld. Senior Advocate that '**proceeds of crime**' is a sine qua non for the commission of offence of Money Laundering.

During the course of arguments, it is fairly conceded by the Ld. SPP that the source of money involved in the instant case is still under investigation. He also fairly conceded that as of now, there is no

material available with ED to establish that the money involved in the present case came from any tainted source. However, he forcefully argued that a huge sum of money is involved in the present case. He placed strong reliance upon the judgment of Hon'ble Apex Court in the matter of **Union of India v. Hassan Ali Khan & Anr (2011) 10 SC 235** which in my opinion is misplaced as in that case, there was categorical allegation that the money involved was proceeds of crime and a link, although nebulous, between the sums of money involved and the arm deal was emanating out of the material available on record.

Hon'ble Gujarat High Court in the matter of **RAKESH MANEKCHAND KOTHARI v. UNION OF INDIA Special Criminal Application (Direction) No. 4496 Of 2014 And Special Criminal Application No. 4672 Of 2014 D.o.D. 16-01-2015** has observed as under:-

"The expression **proceeds of crime** means property derived or obtained, directly or indirectly by any person **as a result of criminal activity** relating to a scheduled offence or the value of any such property {Section 2(u)}. Thus, **a property acquires a taint on account of being a derivative of criminal activity** relating to a scheduled offence and includes the value of such property (emphasis supplied).

In the case at hand, Ld. SPP himself has admitted that there is no connecting link between the money involved and any criminal activity to establish that the money has come from any tainted source, so as to stigmatize it as proceeds of crime.

23. At this stage, I am refraining myself from entering into meticulous examination of material collected by the prosecution so as not to unnecessarily prejudice the case of either of the parties or pre-judge the issue. In **Sai Chandrasekhar v. Directorate of Enforcement (supra)**, the Hon'ble High Court had culled out the conditions to be considered for grant of bail and it was laid down as under :

19. At the stage of granting bail, detailed examination of evidence and elaborate documentation of the merits of the case should be avoided, so that no party should have the impression that his case has been prejudiced. (Niranjan Singh and another V. Prabhakar Rajaram Kharote and others (1980) 2 SCC 559.)

20. The jurisdiction to grant bail has to be exercised on the basis of the well-settled principles having regard to the facts and circumstances of each case. The following factors are to be taken into consideration while considering an application for bail:- (i) the nature of accusation and the severity of the punishment in the case of conviction and the nature of the materials relied upon by the prosecution; (ii) reasonable apprehension of tampering with the witnesses or apprehension of threat to the complainant or the witnesses; (iii) reasonable possibility of securing the presence of the accused at the time of trial or the likelihood of his abscondence; (iv) character behaviour and standing of the accused and the circumstances which are peculiar to the accused; (v) larger interest of the public or the State and similar other considerations (vide Prahlad Singh Bhati v. NCT, Delhi and another (2001) 4 SCC 280). There is no hard and fast rule regarding grant or refusal to grant bail. Each case has to be considered on the facts and circumstances of each case and on its own merits...”

24. Considering the period of incarceration, the fact that the applicant/accused is apparently not at flight risk coupled with the fact considering the intricate nature of investigation trial is expected to consume a considerable time, applicant/accused Luo Sang @ Charlie Peng is admitted to bail on his furnishing bail bond in the sum of Rs.1,00,000/- with two sureties each in the like amount to the satisfaction of Ld. MM/Link MM/ Duty MM and subject to the following conditions :-

- i. He shall continue to cooperate with the ongoing investigation.
- ii. He shall appear on every date of hearing as fixed by the court concerned;
- iii. He shall not leave the country without the permission of the court;
- iv. He shall inform the concerned IO about his active mobile number and he shall always keep his mobile phone on at all times;
- v. He shall drop a pin on the google map to ensure that his location is available to the investigating agency;

- vi. He shall commit no offence whatsoever during the period when he is on bail in the instant matter. In the event of there being any FIR/DD entry/complaint lodged against him, it would be open to the State to seek redressal in accordance with law;
- vii. He shall surrender his passport before the court concerned atleast seven days after his release from jail.

25. Application stands disposed off accordingly.

26. Copy of this order be given dasti to all the concerned.

27. Instant order be uploaded on the court website immediately.

DHARMENDER RANA Digitally signed by
DHARMENDER RANA
Date: 2021.07.23
17:21:00 +05'30'

(Dharmender Rana)
ASJ-02, NDD/PHC/New Delhi
23.07.2021