(2016) 02 GUJ CK 0225

In the Gujarat High Court

Case No : Criminal Misc. Application (For Regular Bail) No. 24043 of 2015

Manish Bhogilal Shah APPELLANT

Vs

State of Gujarat and Others RESPONDENT

Date of Decision : 25-02-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 439
Penal Code, 1860 (IPC) — Section 120(B), Section 420, Section 465, Section 467, Section 468, Section 471, Section 477 A
Prevention of Money-Laundering Act, 2002 — Section 2 (u), Sectio

Citation : (2016) 02 GUJ CK 0225

Hon'ble Judges : A.J. Desai, J.

Bench : Single Bench

Advocate : Ashish M. Dagli, Advocate, for the Appellant; Mitesh Amin, Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

A.J. Desai, J.—1. By way of the present application under Section 439 of the Code of Criminal Procedure, 1973 (hereinafter referred to as ''the Code'') read with Section 45 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as ''PML Act''), the applicant has prayed to release him on regular bail in connection with Complaint No. - ECIR/1/STSZO/2014 registered at the instance of the respondent No. 2 - the authority appointed under the PML Act for the offences punishable under Section 3 read with Section 4 of the PML Act.

2. The brief facts arose from the record are as under:--

"2.1 An information was received from the Joint Commissioner of Customs, Surat vide letters dated 27.2.2014 and 6.3.2014 which revealed that Surat based diamond companies M/s. Harmony Diamonds Pvt. Ltd., M/s. Agni Gems Pvt. Ltd. and M/s. R.A. Distributors Pvt. Ltd. have filed fake bills of entry before the ICICI Bank for making foreign remittance through bank accounts with ICICI Bank, Surat. From the information so received it has come to the notice that within a span of two months i.e. January and February, 2014, remittances worth more than Rs. 1000 Crore against fake import documents viz. Bills of entry and invoices were made from the said accounts to Hongkong and Dubai. The Customs Department, Surat have confirmed that the bills of entry, in question, did not originate from their offices. Thus, the said bills of entry etc. against which the said remittances were affected were apparently fake. Enquiries made with the banks and the documents obtained from them revealed that the amount as mentioned below were remitted from the following companies having accounts with ICICI Bank. Thus, amount to the tune of Rs. 5395.75 Crores (Rupees Five Thousand Three Hundred Ninty Five Crores and Seventy Five Lacs) were remitted to companies in Hong Kong and UAE on the strength of fake bills of entry.

2.2 The investigation revealed that the above mentioned Indian entities had received the above said amounts through RTGS credits in their respective bank accounts with ICICI Bank primarily from certain other Indian firms viz. M/s. Vandana & Co., M/s. Natural Trading Co., M/s. Maruti Trading, M/s. Millenium & Co., M/s. Aarzoo Enterprises, M/s. GT Traders, M/s. M.D. Enterprises, M/s. Jash Traders etc. which had transferred the above said amounts from their accounts with Axis Bank held at Mumbai and Surat. These firms in turn had received RTGS Credits into their bank accounts from various other firms based in New Delhi, Mumbai and Surat.

2.3 It is submitted that initially investigation was carried out under the FEMA, 1999. Enquiries revealed that Afroz Mohamed Hasanfatta is the brain behind the entire racket of sending remittances outside India on the basis of forged bills of entry. He was assisted in this racket by Madanlal Jain and Bilal Haroon Gilani. Searches were conducted at the premises of Afroz Fatta in Surat and Madanlal Jain in Mumbai on 21.3.2014 and 28.3.2014 respectively which resulted in the recovery and seizure of documents, mobile phones, CPU etc.

2.4 In the meanwhile, a complaint was received by the Crime Branch, Surat from ICICI Bank against M/s. R.A. Distributors Pvt. Ltd. and its Directors alleging that the Company had prepared 17 fake bills of entry and presented the same before ICICI Bank for outward remittances based on which FIR No. I/16/2014 dated 11.4.2014 was registered by the Detection of Crime Branch, Surat Police under Sections 420, 465, 467, 468, 471, 477 A of Indian Penal Code. Another FIR No. I/17/2014 dated 13.4.2014 has also been registered by the Detection of Crime Branch, Surat Police against M/s. Harmony Diamonds Pvt. Ltd., M/s. Agni Gems Pvt. Ltd., and their Directors for similar offences.

2.5 Investigations under PML Act, 2002 have been initiated as the offences under Sections 120(B), 420, 467, 471 of Indian Penal Code are ''scheduled offences'' in terms of Section 2(1)(y) of the PML Act which have been registered against the above said companies and its directors. Upon scrutiny of the said two FIRs, a case was registered under ECIR No. 01/2014 dated 17.4.2014 for investigation into the offence of money laundering under PML Act, 2002.

2.6 During the course of investigation, it has been revealed from the statements of Madanlal Jain that he had created several firms with name sake partners and that he had created certain companies viz : M/s. R.A. Distributors, M/s. Riddhi Exim Pvt. Ltd. etc. and handed over these companies to Afroz Fatta for importing of diamonds; that Afroz Fatta had opened bank accounts of these companies in ICICI bank, Surat; that no diamonds were imported in these companies and that payments were made on the strength of fake and fabricated bills of entry presented before ICICI Bank. The funds were further transferred from the firms having accounts with Axis Bank to the accounts of M/s. R.A. Distributors, M/s. Riddhi Exim Pvt. Ltd., etc. with ICICI Bank, Surat from which funds were remitted to Hong Kong and Dubai on the basis of forged bills of entry.

2.7 On the basis of intelligence that Manish Bhogilal Shah resident of Surat is the proprietor of M/s. Mabrook Trading FZE, Dubai, UAE (one of the entities to which remittances were sent from ICICI bank on the basis of forged bills of entry), his residential premises was searched on 1.7.2015 which resulted in the seizure of mobile phones. He was thereafter summoned and his statement was recorded wherein he has stated that he went to Dubai in 2008 and stayed there till August 2013; that he was partner of M/s. Yusuf Karam along with one Yusufbhai who was introduced to him by Jayesh Desai, his maternal uncle; that Mabrook Trading FZE was opened by Madanlal Jain who was a friend of his maternal uncle Jayesh Desai; that the bank accounts of the firm were with Bank of Baroda and Noor Islamic Bank in Dubai; that he had gone to Hong Kong once but he was not a proprietor of any company in Hong Kong; that he was paid salary by Jayesh Desai in cash in India; that he had met Madanlal Jain on three occasions in Dubai; that he had stopped working for Mabrook Trading in the year 2013 and he had told Madanlal Jain to look after the firm as it belonged to him; that on instructions of Jayesh Desai, he gave the Power of Attorney to a girl Ms. Remidous working with him but he was still the proprietor of the entity.

2.8 Investigation has revealed that on the basis of forged bills of entry, remittances amounting to around Rs. 736 Crores has been made from the accounts in ICICI bank to the account of M/s. Mabrook Trading of which Manish Bhogilal Shah is the Proprietor. Letters of request have been issued to the authorities in UAE and Hong Kong and their replies are awaited."

3. The applicant came to be arrested by the Investigating Agency on 2.7.2015. Thereafter, the applicant preferred an application under Section 439 of the Code before the learned Principal District & Sessions Judge and Special Designated Judge, PMLA, Ahmedabad (Rural) at Ahmedabad being Criminal Misc. Application No. 1864 of 2015 which was dismissed on 24.11.2015. Hence, this application.

4. Pursuant to the notice issued by this Court on 16.12.2015, learned Central Government Standing Counsel Ms. Trusha Patel appeared on behalf of respondent No. 2 and filed affidavit-in-reply dated 6.1.2016.

5. Mr. Ashish Dagli, learned advocate appearing for the applicant would submit

that the only allegation levelled against the present applicant is that he is part of conspiracy and has helped another accused, namely, Madanlal Jain. He would submit that even as per the case of the prosecution, the applicant had worked with one of the Company of said Madanlal Jain for a short period and was paid monthly salary and has not earned anything which would be treated as proceeds of crime. He would submit that the applicant is not facing any scheduled offences of PML Act. He would, therefore, submit that the rigors of Section 45 of the PML Act would not be applicable. By taking me through the statements of applicant himself as well as the co-accused and the material collected by the Investigating Agency, he would submit that the applicant cannot be treated as one of the conspirators who have hatched conspiracy to remit Indian currency by illegal means to save foreign countries. He, therefore, would submit that the application be allowed.

6. On the other hand, learned Standing Counsel Ms. Trusha Patel appearing for the respondent No. 2 - original complainant has opposed this application and submitted that it is an admitted fact that the applicant has earned money through the scam of more than Rs. 5,000/- Crores and the applicant was aware that some illegal activities are being carried out by the co-accused and, therefore, he cannot say that he is not one of the conspirators.

6.1 She would submit that under Section 24 of PML Act, the burden of proof is upon the accused person to prove that the money received by him is untainted one. She would submit that the applicant - accused has miserably failed in establishing that the money involved in the present complaint are untainted property. She, therefore, would submit that provisions of Section 45 of PML Act would be applicable and, therefore, unless the Court concludes that the applicant is innocent, he may not be released on bail. In support of her contention, she has relied upon the Division Bench decision of this Court dated 16.1.2015 rendered in Special Criminal Application (Direction) No. 4496 of 2014 with Special Criminal Application No. 4672 of 2014. She has also relied upon the decision of the coordinate Bench of this Court dated 31.7.2013 rendered in Special Civil Application No. 4171 of 2012 with Special Civil Application No. 1059 of 2012 wherein while dealing with the provisions of PML Act, this Court has held that certain presumptions are to be drawn as per Section 23 of PML Act. She, therefore, would submit that the application be rejected.

6.2 In alternate, she would submit that even otherwise, considering the gravity of offence and the maximum punishment provided under the PML Act, the Court may not use his powers under Section 439 of the Code.

7. I have heard learned advocates appearing for the parties. If the complaint is looked into, the present applicant along with other six accused have been charged under Sections 3 and 4 of the PML Act. The four accused against whom FIR being C.R. No. I-85 of 2015 was lodged on 25.3.2015 at Kishanvadi Police Station, the present applicant is not implicated as an accused. For the ready reference and for appreciating the arguments advanced by learned advocates for

the respective parties, certain provisions of the PML Act are reproduced herein below:--

8. Sections 3 and 4 of the PML Act read as under:--

"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 and projecting it as untainted property shall be guilty of offence of money-laundering.

4. Punishment for money-laundering -- Whoever commits the offence of money-laundering shall be punishable with rigorous imprisonment for a term which shall not be less than three years but which may extend to seven years and shall also be liable to fine which may extend to five lakh rupees: Provided that where the proceeds of crime involved in money-laundering relates to any offence specified under paragraph 2 of Part A of the Schedule, the provisions of this section shall have effect as if for the words "which may extend to seven years", the words "which may extend to ten years" had been substituted."

9. Section 3 provides that a person shall be guilty of offence of money laundering when he is directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected proceeds of crime including the concealment, possession, acquisition or use and projecting or claiming it as untainted property. The definition of "proceeds of crime: provided in Section 2 (u) reads as under:--

"2 (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;"

10. The "scheduled offence" defined under Section 2 (y) of the PML Act reads as under:--

"2 (y) "scheduled offence" means --

(i) the offences specified under Part A of the Schedule; or

(ii) the offences specified under Part B of the Schedule if the total value involved in such offences is thirty lakh rupees or more; or]

(iii) the offences specified under Part C of the Schedule;"

11. In view of the above, if the Schedules to the Act are perused, the applicant is not charged with any of the offences punishable under PML Act referred in the Schedule. It is pertinent to note that the applicant is facing charge only for the offences punishable under PML Act and is not the accused wherein the allegations of cheating, forgery etc. have been made against other accused which are scheduled offence. Therefore, there might be some illegal activities committed by the applicant i.e. with regard to cricket betting, but in my prima facie opinion, the said income would not be covered under the definition of

proceeds of crime.

12. Section 45 of PML Act reads as under:--

"45. Offences to be cognizable and non-bailable --

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless --

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

Provided that a person who is under the age of sixteen years or is a woman or is sick or infirm, may be released on bail, if the special court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under section 4 except upon a complaint in writing made by --

(i) the Director; or

(ii) any officer of the Central Government or State Government authorised in writing in this behalf by the Central Government by a general or a special order made in this behalf by that Government.

[(1A) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other provision of this Act, no police officer shall investigate into an offence under this Act unless specifically authorised, by the Central Government by a general or special order, and, subject to such conditions as may be prescribed.]

(2) The limitation on granting of bail specified in sub-section (1) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

13. Section 24 of PML Act reads as under:--

"24. Burden of Proof -- When a person is accused of having committed the offence under section 3, the burden of proving that proceeds of crime are untainted property shall be on the accused."

14. The burden of proof as referred to herein above relates to proceeds of crime. As stated herein above, since the applicant is not facing any charge for any offence under Part A of Schedule, Section 45 (1) of the PML Act would not be prima facie applicable and, therefore, it is not required that the applicant is to be declared as not guilty of such offence at the time of dealing with an application

for bail.

15. Under Section 45 (2) of PML Act, the other provisions of the Code would be applicable and, therefore, the case is to be dealt with accordingly. Therefore, I am dealing with the same. As far as the allegations levelled against the present applicant are concerned, I have gone through the statement of the applicant himself. It appears that he had worked with one of the Company of Manilal Jain for a short period and was paid monthly salary. The investigation is almost over and on completion of investigation, the present complaint has been filed by the authority. I have also considered the fact that the maximum punishment is of 7 years and, therefore, the case of the applicant can be considered by imposing certain conditions. In my view, the judgments relied upon by Ms. Patel would not be applicable to the facts of the present case.

16. I have gone through the unreported decision dated 5.10.2015 passed by the coordinate Bench of this Court (Coram:--Hon''ble Ms. Justice Harsha Devani) in the case of Afroz Mohmad Hasanfatta v. Deputy Director and another, Criminal Misc. Application No. 17000 of 2014. I have also gone through another unreported decision dated 31.3.2015 of the coordinate Bench of this Court (Coram:-- Hon''ble Mr. Justice Paresh Upadhyay) in the case of Rakesh Manekchand Kothari v. Deputy Director, Enforcement Directorate, in Criminal Misc. Application No. 3637 of 2015 wherein the coordinate Bench has dealt with similar offence and has refused to release the applicant on bail on the ground that he is not facing any charge of scheduled offence which order has been confirmed by the Hon''ble Supreme Court.

17. Considering the facts and circumstances of the case, I am of the opinion that as the applicant is not facing any charges for the scheduled offence, the rigors of Section 45 of the PML Act would not come in the way of the applicant.

18. Hence, the application is allowed and the applicant is ordered to be released on bail in connection with Complaint No. -ECIR/1/STSZO/2014 registered at the instance of the respondent No. 2, on executing a bond of Rs. 1,00,000/- (Rupees One Lac only) with two local sureties of Rs. 50,000/- each to the satisfaction of the trial Court and subject to the conditions that he shall;

"[a] not take undue advantage of liberty or misuse liberty;

[b] not act in a manner injuries to the interest of the prosecution;

[c] surrender passport, if any, to the lower court within a week;

[d] not leave State of Gujarat without prior permission of the concerned Sessions Judge;

[e] mark presence with the respondent No. 2 on every Monday of each English Calendar month for a period of three months and thereafter on any day of the first week of each English Calendar month for a period of one year;

[f] furnish the present address of residence to the I.O. and also to the Court at

the time of execution of the bond and shall not change the residence without prior permission of this Court;"

19. The Authorities will release the applicant only if he is not required in connection with any other offence for the time being. If breach of any of the above conditions is committed, the Sessions Judge concerned will be free to issue warrant or take appropriate action in the matter. Bail bond to be executed before the lower court having jurisdiction to try the case. It will be open for the concerned Court to delete, modify and/or relax any of the above conditions in accordance with law. At the trial, the trial Court shall not be influenced by the observations of preliminary nature, qua the evidence at this stage, made by this Court while enlarging the applicant on bail.

20. Rule made absolute to the aforesaid extent. Direct service is permitted.

21. Upon pronouncement of the judgment, Ms. Trusha Patel, learned Central Government Standing Counsel appearing for the respondent No. 2 has prayed to stay the operation, implementation and execution of the present judgment. Considering the facts and circumstances of the present case, the request is refused.

