

(2020) 05 PAT CK 0045

In the Patna High Court

Case No : Criminal Miscellaneous No. 41413 Of 2019

Most. Ahilya Devi

APPELLANT

Vs

State Of Bihar And Others

RESPONDENT

Date of Decision : 28-05-2020

Acts Referred:

Constitution Of India, 1950 — Article 14, 21
Prevention Of Money Laundering Act, 2002 — Section 3, 4, 45, 45(1), 45(1)(ii)
Code Of Criminal Procedure, 1973 — Section 438, 438(2), 439
Terrorist And Disruptive Activities (Prevention) Act, 1987 — Section 20(8)

Citation : (2020) 05 PAT CK 0045

Hon'ble Judges : Chakradhari Sharan Singh, J

Bench : Single Bench

Advocate : Y.V.Giri, Sarbottam Kumar Sarkar, Sumit Kumar Jha, Shrishti Singh, Md. Matloob Rab, S.D.Sanjay, Kumar Priya Ranjan

Final Decision : Allowed

Judgement

Chakradhari Sharan Singh, J

1. The Supreme Court in its decision, rendered in case of Nikesh Tarachand Shah vs. Union of India and Another, reported in (2018) 11 SCC 1, on 23rd November, 2017, has declared Clause (ii) of sub-Section (1) of Section 45 of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as 'the Act'), ultra vires Articles 14 and 21 of the Constitution of India.

2. Section 45(1) of the Act, as the same stood, when it was declared ultra vires, read thus : -

"45. Offences to be cognizable and non- bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(b) 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 special order made in this behalf by that Government.

(2) The limitation on granting of bail specified in clause (b) of 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."

3. Subsequent to the Supreme Court's decision, in case of Nikesh Tarachand Shah (supra), certain amendments were made in various provisions of the Act including Section 45(1) of the Act. The amending provision, which is relevant for the issue which has arisen in the present matter, reads thus : -

"For the words 'punishable for a term of imprisonment of more than three years under Part A of the Schedule', the words 'under this Act' shall be substituted."

4. Evincibly, consequent upon the aforesaid amendment through Finance Act, 2018, Section 45 of the Act, as it now stands, reads thus : -

"Section 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 under this Act 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 in infirm, or is accused either on his own or along with other co-accused

of money laundering a sum of less than one crore rupees 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 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 clause (b) of 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."

5. It can be easily deciphered, on comparative reading of Section 45(1) of the Act, pre-amendment and post-amendment, that Clause (ii) of sub-Section (1) remained as it stood before amendment.

6. In the aforesaid background, the primordial and the only legal issue, which has arisen in the present matter, is as to whether the Supreme Court's decision in case of Nimesh Tarachand Shah (supra) can be said to have lost its significance because of the aforesaid amendment in Section 45(1) of the Act.

7. It is eminent that clause (ii) of sub-Section (1) of Section 45 of the Act places two conditions for release of a person accused of an offence under the Act, on bail, if a Public Prosecutor opposes the bail application, namely; the Court is satisfied (i) that there are reasonable grounds for believing that the accused is not guilty of such offence and

(ii) that he is not likely to commit any offence while on bail. Whether substitution of the words 'under this Act' in place of the words 'punishable for a term of imprisonment of more than three years under Part A of the Schedule' in Section 45(1) of the Act, has the impact of meeting with the reasonings and logic incorporated and discussed by the Supreme Court in case of Nimesh Tarachand Shah (supra) for declaring the Clause (ii) of Sub-section (1) of Section 45 of the Act ultra vires and, therefore, Clause (ii) of sub-Section (1) of Section 45 of the Act is in present form should be treated to be valid, despite Supreme Court's decision in case of Nimesh Tarachand Shah (supra) is the central question to be gone into in the present application.

8. This application has been filed under Section 438 of the Code of Criminal Procedure for grant of anticipatory bail in connection with Complaint Case No. 09

of 2018 PMLA (Patna) arising out of ECIR No. PTZO/05/2013 and PTZO/02/2018 registered for the offence under Section 3, punishable under Section 4 of the Prevention of Money Laundering Act, 2002.

9. One Ashok Kumar Yadav, it is alleged, is accused in 26 criminal cases. The investigation was carried out against him in respect of commission of offence under the Act. The petitioner is the widow of the deceased younger brother of said Ashok Kumar Yadav. It is alleged in the complaint case registered by the Enforcement Directorate that said Ashok Kumar Yadav has purchased immovable properties in the name petitioner and her deceased husband to the tune of approximately Rs.5,66,000/-. Further, a total sum of Rs. 6,95,000/- has been found deposited in the savings bank account of the petitioner, which, it is alleged, has been done by said Ashok Kumar Yadav. In addition, a sum of Rs.2,99,500/- is lying in the account of the deceased husband of the petitioner, as per the prosecution's case, constituting offence punishable under Section 4 of the Act.

10. I have heard Mr. Y.V.Giri, learned Senior Counsel appearing on behalf of the petitioner and Mr. S.D.Sanjay, learned Additional Solicitor General for India, assisted by Mr. Kumar Priya Ranjan, learned Central Government Counsel, appearing on behalf of Union of India, at length.

11. This is to be noted that the petitioner has been granted interim protection by an order of this Court dated 30.09.2019.

12. Mr. Y.V.Giri, learned Senior Counsel appearing on behalf of the petitioner, has submitted that introduction of the words 'under this Act' would not amount to reviving twin pre-conditions for grant of bail imposed in sub-Section (1) of Section 45 of the Act, which is the view rightly taken by the High Court of Judicature at Bombay in its decision rendered on 6th June, 2018 in Bail Application No. 286 of 2018 (Sameer M. Bhujbal vs. Assistant Director, Directorate of Enforcement and Anr.) and the High Court of Delhi, in its decision dated 9th July, 2019, in Bail Application No. 249 of 2019 (Upendra Rai vs. Directorate of Enforcement). He has given much emphasis on the observations made by the Supreme Court in paragraph 46 of the decision in case of Nikesh Tarachand Shah (supra) to submit that once the said two provisions have been declared violative of Article 21 of the Constitution of India, the same cannot be said to have revived by introducing amendment of the nature as noted above. He has submitted that the amendment introduced in 2018 in sub-Section (1) of Section 45 of the Act does not amount to reenactment of the provision to the extent it related to imposition of conditions for release on bail, which has been declared ultra vires Articles 14 and 21 of the Constitution of India. He has also relied on a judgment of High Court of Madhya Pradesh Bench at Indore, dated 29th August, 2018, passed in M.Cr.C. No. 34201 of 2018 (Dr. Vinod Bhandari Vs. Assistant Director, Directorate of Enforcement), wherein it has been held that the original Section 45(1)

(ii) cannot be said to have revived or resurrected by the Amending Act.

13. Mr. S.D.Sanjay, learned Additional Solicitor General for India, appearing for the Union of India, per contra, has placed reliance on Supreme Court's decision in case of P. Chidambaram vs. Directorate of Enforcement, reported in (2019) 9 SCC 24, which is a judgment subsequent to the aforesaid amendment in Section 45(1) of the Act and has submitted that applying the provision under Section 45(1) of the Act, the application for grant of anticipatory bail was rejected in that case.

14. He has submitted, with reference to the Supreme Court's decisions in case of Directorate of Enforcement v. Ashok Kumar Jain, reported in (1998) 2 SCC 105; State of Gujarat v. Mohanlal Jitmalji Porwal and Others, reported in (1987) 2 SCC 364; and Y.S.Jagan Mohan Reddy v. C.B.I., reported in (2013) 7 SCC 439, that in economic offences, an accused is not entitled for anticipatory bail as gravity of economic offences affects the entire society, and, therefore, constitute a class apart and need to be visited with a different approach in the matter of grant of bail. He has contended that similar provisions under the Narcotics Drugs and Psychotropic Substances Act, 1985, and Terrorist and Disruptive Activities (Prevention) Act, 1987, as also Maharashtra Control of Organized Crime Act, 1999, have been upheld. He has referred to the decisions rendered by the Supreme Court in case of Kartar Singh vs. State of Punjab, reported in (1994) 3 SCC 569, whereby constitutional validity of Section 20(8) of Terrorist and Disruptive Activities (Prevention) Act, 1987, containing similar restrictions on grant of bail has been upheld. According to him, the Supreme Court in case of Nikesh Tarachand Shah (supra) declared clause (ii) of Sub-section (1) of Section 45 of the Act ultra vires because of the first part of the provision which controlled the twin conditions, which has been subsequently amended. He has submitted that the prescription of twin-conditions for grant of bail in clause (ii) of Sub-section (1) of Section 45 of the Act has not been held to be ultra vires Articles 14 and 21 of the Constitution of India per se. According to him, the amended provision of the Act has completely altered the situation. He has argued that with the substitution of the words 'such offences under the Act', now the conditions for bail apply with respect to an offence of money laundering, which is a heinous economic offence as laid down by the Supreme Court in various cases including the recent decision in case of P. Chidambaram (supra). He has contended that the twin conditions, mentioned in Section 45(1) of the Act, imperative for grant of bail have been declared ultra vires by the Supreme Court in case of Nikesh Tarachand Shah (supra) not because of any inherent defect in these two conditions in itself, but because of its dependence on the applicability, relatable only to the offences in Part A of the Schedule; for the reason that the offences under Part A of the Schedule are not offences of money laundering rather different predicate offences.

15. According to him, the amendment has been introduced with effect from 19.04.2018 after taking note of the decision of the Supreme Court in case of Nikesh Tarachand Shah (supra) and the defects, which were pointed out in the judgment, have thus been rectified, for, in place of the term "punishable for a

term of imprisonment of more than three years of Part A of the Schedule", "under this Act" has been substituted. He accordingly submits that the twin conditions have now become referable and relatable to the offence under the Act of 2002. The discrepancy, as pointed out by the Supreme Court, according to him, has thus been removed in the statute book, he contends. He has submitted that decision of the High Court of Delhi in case of Upendra Rai (*supra*) and that of the High Court of Judicature at Bombay in case of Sameer M. Bhujbal (*supra*) cannot be relied upon, which have not noticed, in correct perspective, the situation emerging out of the aforesaid amendment in sub-Section (1) of Section 45 of the Act.

16. To appreciate rival submissions made on behalf of the parties on the question of purpose and effect of the amendment in question in sub-Section (1) of Section 45 of the Act, it would be apt to take note of the purpose of the amendment and the Supreme Court's observation in case of Nikesh Tarachand Shah (*supra*) while dealing with various provisions of the Act and considering the challenge to the validity of Section 45(1) of the Act.

17. The statutory history of Section 45 has been succinctly discussed in the decision in case of Nikesh Tarachand Shah (*supra*) by the Supreme Court in paragraphs 26 to 30. The Supreme Court has explained, with illustrations, the effect of the twin conditions imposed for grant of bail, if a person was accused of offence punishable for a term of imprisonment of more than three years under Part A of the Schedule. The Supreme Court observed in paragraph 31 as under : -

"31. The statutory scheme, as originally enacted, with Section 45 in its present avatar, would, therefore, lead to the same offenders in different cases having different results qua bail depending on whether Section 45 does or does not apply. The first would be cases where the charge would only be of money laundering and nothing else, as would be the case where the scheduled offence in Part A has already been tried, and persons charged under the scheduled offence have or have not been enlarged on bail under the Code of Criminal Procedure and thereafter convicted or acquitted. The proceeds of crime from such scheduled offence may well be discovered much later in the hands of Mr. X, who now becomes charged with the crime of money laundering under the 2002 Act. The predicate or scheduled offence has already been tried and the accused persons convicted/acquitted in this illustration, and Mr. X now applies for bail to the Special Court/High Court. The Special Court/High Court, in this illustration, would grant him bail under Section 439 of the Code of Criminal Procedure the Special Court is deemed to be a Sessions Court and can, thus, enlarge Mr. X on bail, with or without conditions, under Section 439. It is important to note that Mr. X would not have to satisfy the twin conditions mentioned in Section 45 of the 2002 Act in order to be enlarged on bail, pending trial for an offence under the 2002 Act."

18. The second illustration finds place in paragraph 32 of the judgment in case of Nikesh Tarachand Shah (*supra*), in a situation, when a person being charged with

an offence in Part A of the Schedule together with a predicate offence in Part B of the Schedule. The Supreme Court observed as under in paragraph 32 : -

"The second illustration would be of Mr. X being charged with an offence under the 2002 Act together with a predicate offence contained in Part B of the Schedule. Both these offences would be tried together. In this case, again, the Special Court/High Court can enlarge Mr. X on bail, with or without conditions, under Section 439 of the Code of Criminal Procedure, as Section 45 of the 2002 Act would not apply."

19. Third illustration finds place in paragraph 32 itself in following terms :-

"In a third illustration, Mr. X can be charged under the 2002 Act together with a predicate offence contained in Part A of the Schedule in which the term for imprisonment would be 3 years or less than 3 years (this would apply only post the Amendment Act of 2012 when predicate offences of 3 years and less than 3 years contained in Part B were all lifted into Part A). In this illustration, again, Mr. X would be liable to be enlarged on bail under Section 439 of the Code of Criminal Procedure by the Special Court/High Court, with or without conditions, as Section 45 of the 2002 Act would have no application."

20. By way of fourth illustration, the Supreme Court considered a situation where a persons is prosecuted for an offence under the Act and an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule and then discussed the consequences thereof. The Supreme Court observed as under : -

"In this illustration, the Special Court/High Court would enlarge Mr. X on bail only if the conditions specified in Section 45(1) are satisfied and not otherwise. In the fourth illustration, Section 45 would apply in a joint trial of offences under the Act and under Part A of the Schedule because the only thing that is to be seen for the purpose of granting bail, under this Section, is the alleged occurrence of a Part A scheduled offence, which has imprisonment for over three years. The likelihood of Mr. X being enlarged on bail in the first three illustrations is far greater than in the fourth illustration, dependant only upon the circumstance that Mr. X is being prosecuted for a Schedule A offence which has imprisonment for over 3 years, a circumstance which has no nexus with the grant of bail for the offence of money laundering. The mere circumstance that the offence of money laundering is being tried with the Schedule A offence without more cannot naturally lead to the grant or denial of bail (by applying Section 45(1)) for the offence of money laundering and the predicate offence."

21. The Supreme Court thus noticed anomalies in prescribing conditions for entertaining an application for grant of bail under Section 45(1) of the Act with reference to the Scheduled offences. The Supreme Court, in paragraph 46 of the judgment in case of Nikesh Tarachand Shah (supra), has unequivocally held that Section 45 of the Act is a drastic provision which makes drastic inroads into the fundamental right of personal liberty guaranteed under Article 21 of the

Constitution of India. The Court observed that before application of such provision, one must be doubly sure that it furthers a compelling State interest in tackling serious crimes. Absent any such compelling State's interest, indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. The provisions akin to Section 45 have been upheld on the ground that there was compelling State interest in tackling crimes of an extremely heinous nature, Supreme Court noted. For the benefit of quick reference, paragraph 46 of the decision in case of Nimesh Tarachand Shah (supra) is being reproduced hereinbelow : -

"46. We must not forget that Section 45 is a drastic provision which turns on its head the presumption of innocence which is fundamental to a person accused of any offence. Before application of a section which makes drastic inroads into the fundamental right of personal liberty guaranteed by Article 21 of the Constitution of India, we must be doubly sure that such provision furthers a compelling State interest for tackling serious crime. Absent any such compelling State interest, the indiscriminate application of the provisions of Section 45 will certainly violate Article 21 of the Constitution. Provisions akin to Section 45 have only been upheld on the ground that there is a compelling State interest in tackling crimes of an extremely heinous nature."

22. I must emphasize, at this juncture, that the Supreme Court clearly held that indiscriminate application of the provision of Section 45 of the Act will certainly violate Article 21 of the Constitution of India.

23. In the aforesaid background, it is to be seen as to whether the amendment introduced in Section 45 of the Act, as noted above, by Act No. 13 of 2018, shall amount to re-framing the entire Section 45 and thereby reviving and resurrecting the requirement of twin conditions under sub-Section (1) of Section 45 of the Act for grant of bail.

24. In my opinion, in view of clear language used in paragraph 46 of the Supreme Court's decision in case of Nimesh Tarachand Shah (supra), I have no hesitation in reaching a definite conclusion that the amendment in sub-Section (1) of Section 45 of the Act introduced after Supreme Court's decision in case of Nimesh Tarachand Shah (supra) does not have the effect of reviving the twin conditions for grant of bail, which have been declared ultra vires Articles 14 and 21 of the Constitution of India.

25. I do not find force in submission made on behalf of Union of India that a different view has been taken in case of P. Chidambaram (supra) by the Supreme Court than the view taken in case of Nimesh Tarachand Shah (supra) on the question of constitutional validity of sub-Section (1) of Section 45 of the Act. There is no discussion in this regard in the said judgment in case of P. Chidambaram (supra). The application for anticipatory bail in case of P. Chidambaram (supra) was rejected on merits of the allegation and other materials.

26. In view of the above discussions, I do not find any reason to take a different view from what has been taken by the High Court of Judicature at Bombay in case of Sameer M. Bhujbal (supra), High Court of Delhi in case of Upendra Rai (supra) and that of the High Court of Madhya Pradesh Bench at Indore in case of Dr. Vinod Bhandari (supra).

27. Mr. Y.V. Giri, learned senior counsel, has referred to various judicial precedents in support of his submissions. In view of the opinion, which I have formed, as indicated above, the said precedents have not been referred to.

28. Coming to the merits of the case, I have already outlined the case of the prosecution. The petitioner is the widow of deceased younger brother of the main accused Ashok Kumar Yadav against whom there are 26 criminal cases and in course of investigation carried out against him in respect of commission of offence under the Act, it emerged that he had purchased properties in the name of the petitioner and her deceased husband to the tune of Rs. 5,66,000/-. Further, a sum of Rs. 6,95,000/- has been allegedly deposited in the savings bank account of the petitioner by the said accused Ashok Kumar Yadav. In addition, a sum of Rs.2,99,500/- is lying in the account of the deceased husband of the petitioner.

29. Considering the nature of allegation, in my opinion, a case of grant of anticipatory bail is made out.

30. This application is allowed.

31. Let the petitioner above named, in the event of her arrest/surrender within eight weeks from today in the Court below, be released on bail on furnishing bail bond of Rs. 10,000/- (Ten Thousand) with two sureties of the like amount each to the satisfaction of the learned Sessions Judge-cum-Special Judge (PMLA), Patna, in connections with Complaint Case No. 09 of 2018 PMLA (Patna) arising out of ECIR No. PTZO/05/2013 and PTZO/02/2018 bearing Special Trial No. 09 of 2018, subject to the conditions as laid down under Section 438(2) of the Code of Criminal Procedure.

32. This is subject to the condition that the petitioner shall present herself before the Police/Court, as the case may be, as and when required and in the event of failure on her part to appear before the Court on two consecutive occasions, her bail bonds shall be liable to be cancelled.