
(2019) 08 DEL CK 0323

In the Delhi High Court

Case No : Bail Application No. 1971 Of 2019, Criminal Miscellaneous Application
No. 33316 Of 2019

Nittin Johari

APPELLANT

Vs

Serious Fraud Investigation Office

RESPONDENT

Date of Decision : 14-08-2019

Acts Referred:

Companies Act, 2013 — Section 89, 212, 212(6), 212(8), 229, 447
Indian Penal Code, 1860 — Section 120B, 409, 467, 468, 471
Narcotic Drugs and Psychotropic Substances Act, 1985 — Section 37
Maharashtra Control of Organised Crime Act, 1999 — Section 21(4), 24

Citation : (2019) 4 JCC 3437

Hon'ble Judges : Sunil Gaur, J

Bench : Single Bench

Advocate : Mohit Mathur, Arshdeep Singh, Gautam Khazanchi, Akshilesh Kumar,
Pradyuman Kaistha, Maninder Acharya, Ajay Digpal, Sameer S. Sinha

Judgement

Sunil Gaur, J

Petitioner is seeking regular bail in CC No. 770/2019, titled as Serious Fraud Investigation Office Vs. Bhushan Steel Limited & Ors. while claiming to be innocent and in custody since 2nd May, 2019. Learned senior counsel for petitioner submits that in the complaint under Section 212 of the Companies Act, 2013, it is averred that petitioner, who was the Chief Financial Officer and Director (Finance) of Bhushan Steel Limited (hereinafter referred to as 'BSL'), had connived with the co-accused to inflate the Stock in Transit (SIT) by making false entries in books of accounts maintained by BSL under Standard Accounting Procedure (SAP) and FOXPRO Legacy and with these manipulated figures, petitioner and his co-accused were able to avail Drawing Power (DP) against cash credit facility during the financial years 2013-14 upto 2015-16. It was submitted that it is erroneously stated in the aforesaid complaint (Annexure A-2) that petitioner had also connived with the bank officials to misuse the Letters of Credit (LC) and by using fraudulent and deceptive methods, petitioner and his co-

accused were able to generate illegitimate flow of funds to BSL amounting to Rs. 45,818 Crores during the period from 2013-14 upto 2016-17 from the banks concerned.

Attention of this Court was drawn to paragraph No. 36 of the aforesaid complaint (Annexure A-2) to point out that investigation conducted by respondent- Serious Fraud Investigation Office (SFIO) revealed that co-accused Brij Bhushan Singal (A-158) and Neeraj Singal (A-159) were the controlling "mind and will" of all the accused companies and in paragraph No. 56 of the complaint in question, it has been specifically averred that aforesaid co-accused Brij Bhushan Singal and Neeraj Singal were actually controlling the "mind and will" of 157 accused companies.

It was also pointed out that in paragraph No. 39 of the aforesaid complaint, it has been categorically averred that co-accused - Brij Bhushan Singal and Neeraj Singal had absolute control over the affairs of BSL and also incorporated various other companies, over which they had deep and pervasive control and funds were transferred between various companies by using a complex web of transactions. It was pointed out that in paragraph No.57 of the aforesaid complaint, it has been clearly spelt out that co-accused Pankaj Kumar Aggarwal was the Accounts Head and petitioner was only Chief Financial Officer.

It was pointed out that in the operative paragraph No. 70 of the aforesaid complaint, the role attributed to petitioner is of conniving with the co-accused but it is concluded in the aforesaid paragraph that co-accused - Brij Bhushan Singal, Chairman of BSL and Neeraj Singal, Vice Chairman, Managing Director and ex-promotor of BSL, were the only ones who were liable to be punished under Section 447 of the Companies Act, 2013 and Sections 409/467/468/471/120-B of IPC for the aforementioned fraudulent acts. It is vehemently submitted by learned senior counsel for petitioner that in paragraph No. 70 of the aforesaid complaint, petitioner is not named as one of the accused, who is liable to be punished for any of the offence under IPC or the Companies Act, 2013. It was pointed out that regarding concealment of accounts of the accused-company, co-accused - Brij Bhushan Singal and Neeraj Singal are the only persons who are named as accused.

Attention of this Court was also drawn by learned senior counsel for petitioner to paragraph No. 93 of the complaint in question to point out that the investigation conducted by the respondent- SFIO revealed that Brij Bhushan Singal and Neeraj Singal are the ultimate beneficial owners of all the 93 companies and therefore, non disclosure of such beneficial interests has rendered them to be punished under Section 89 of the Companies Act, 2013 and petitioner has not been named in the complaint in question, as beneficiary of the alleged fraudulent transaction.

It was submitted by learned senior counsel that petitioner is in custody since 2nd May, 2019 and he is the only accused who is in custody, whereas co-accused Neeraj Singal has been granted bail and no effort was made by the respondent-

SFIO to arrest the other co-accused of petitioner. Thus, it was submitted that it is a fit case for grant of bail to petitioner, as cognizance of the complaint in question has not been taken till date.

On the contrary, learned Additional Solicitor General (ASG) had strongly opposed this application by pointing out that the trial court has heard the arguments on the aspect of taking cognizance and the case is kept for orders on 16th August, 2019. Learned ASG had drawn attention of this Court to the explanation to Section 447 of the Companies Act, 2013 to point out that the definition of "fraud" under this Act is stringent than the definition of "fraud" in IPC. It was pointed out that irrespective of there being no wrongful gain or loss, still the offence alleged is committed. It was also pointed out by learned ASG that sub section (6) of Section 212 of the Companies Act, 2013 puts an embargo on grant of bail. It was submitted that there is no basis to form an opinion at this stage that petitioner is not guilty of the offence alleged and he is not likely to commit any offence, if granted bail.

Attention of this Court was drawn to paragraph No.37 of the complaint in question to highlight the role of petitioner. It was pointed out that petitioner has been named as an accused who had committed the fraudulent activities pertaining to "Letter of Credit", falsification of books of accounts and financial statements. It was further pointed out that in paragraph No. 56 of the complaint in question, petitioner has been named as an accused who had colluded with the co-accused in siphoning of the funds and thereby causing wrongful loss to the banks/ financial institutions amounting to Rs. 20,879 crores. It was also pointed out by learned ASG that in paragraph No. 58 of the complaint in question, it is specifically averred that petitioner and his co-accused had adopted a fraudulent modus operandi of systematically and fraudulently availing over draft facilities from banks, to which they were not entitled to. It was next pointed out that name of petitioner figures at various places in the complaint in question.

Learned ASG had submitted that the order granting bail to co-accused Neeraj Singal has been stayed by the Supreme Court and co-accused Brij Bhushan Singal was not arrested because he was aged 82 years and he had cooperated in the investigation. Learned ASG submitted that petitioner cannot claim parity with co-accused Neeraj Singal as he was granted bail while investigation was in progress and now, the investigation is complete and the complaint in question has been submitted to the concerned court and on bare reading of the complaint in question, a prima facie case is made out against petitioner and so, the bar as contained in Section 212 of the Companies Act, 2013 is attracted. Reliance was placed by learned ASG upon Supreme Court's decision in Satpal Singh Vs. State of Punjab (2018) 13 SCC 813 wherein order granting bail without any reference to the twin embargo put under Section 37 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS Act), was set aside. It was pointed out that the twin embargo put by Section 37 of the NDPS Act is akin to the twin embargo put under Section 212 of the Companies Act, 2013. It was submitted by

learned ASG that the offence committed by petitioner adversely impacts the economy of the country and so, it is a fit case for refusal of bail to petitioner. It was also pointed out by learned ASG that Supreme Court in Serious Fraud Investigation Office Vs. Neeraj Singal 2018 SCC OnLine SC 1573 has taken note of the serious financial fraud or economic misdemeanor to stay the order granting bail to co-accused Neeraj Singal. Thus, dismissal of this application is sought.

In rebuttal, learned senior counsel for petitioner submitted that petitioner has already joined investigation in this case. On the magnitude of the offence committed, attention of this Court was drawn to Supreme Court's decision in Sanjay Chandra Vs. Central Bureau of Investigation (2012) 1 SCC 40 to point out that Supreme Court had noticed that the offence alleged is of huge magnitude jeopardizing the economy of the country but had taken note of the fact that investigation was complete and the charge-sheet was filed and had granted bail on stringent conditions. Learned senior counsel for petitioner pointed out that in Serious Fraud Investigation Office Vs. Neeraj Singal (Supra), Supreme Court has ordered continuation of the directions given by the High Court while releasing Neeraj Singal on bail.

The submissions advanced by both the sides have been duly considered and the complaint (after due investigation) filed by respondent-SFIO has been scrutinized and thereupon it transpires that the magnitude of the offence in question cannot be a criteria to deny bail to petitioner, as the role of petitioner is required to be seen. With the assistance of both sides, the contents of the complaint in question have been duly considered and thereupon it becomes evident that the "mind and will" of the accused-company are the main accused i.e. Brij Bhushan Singal and Neeraj Singal, who had been actually controlling the accused-company. It is a matter of record that main accused Brij Bhushan Singal has not been arrested and co-accused Neeraj Singal has been already granted bail. This Court is conscious of the fact that the order granting bail to co-accused Neeraj Singal deals with the constitutional validity of Section 212 (6) and (8) of the Companies Act, 2013. No doubt operation of the order of Division Bench of this Court in case of Neeraj Singal Vs. Union of India & Ors. 2018 SCC OnLine Del 10838 has been stayed by the Supreme Court but the release of co-accused Neeraj Singal on bail has not been reversed by the Supreme Court. The reason to stay the order in the case of Neeraj Singal (Supra) was on account of the observations made therein, which were of far reaching consequences. In any case, this Court has applied its mind to the role played by petitioner in commission of offence in question and thereupon, it becomes evident that in paragraph No.70 of the complaint in question, the conclusion drawn is as under:-

"Thus, A-1 Company Bhushan Steel Ltd. (Now Tata BSL Ltd.), A-158 Brij Bhushan Singal, Chairman of BSL and A-159 Neeraj Singal are liable to be punished u/s. 447 of the Act of 2013 and s.409,467,468,471 and 120B IPC for the aforementioned fraudulent acts."

Regarding concealment of books of accounts, respondent- SFIO has concluded in paragraph No.92 of the complaint in question as under:-

"Therefore, it is abundantly clear that the books of accounts have been concealed by A-158 Brij Bhushan Singal and A-159 Neeraj Singal and purposefully not produced before the investigation team to evade detection.

A-158 Brij Bhushan Singal and A-159 Neeraj Singal, are, therefore, liable for punishment under section 229 r/w section 447 of Companies Act, 2013."

It is further concluded in paragraph No. 93 of the complaint in question as under:-

"Investigation has revealed that A-158 Brij Bhushan Singal and A-159 Neeraj Singhal are the ultimate beneficial owners of all these 93 companies and therefore, non-disclosure of such beneficial interest has rendered A-158 Brij Bhushan Singal and A-159 Neeraj Singhal to be punished under Section 89 of the Act of 2013."

It is settled legal position that merits of the case are not required to be gone into in detail, while considering the gravity of the offence in matters of bail. The role attributed to petitioner is of colluding with the co-accused in commission of the offence in question. Reliance placed by respondent-SFIO upon Supreme Court's decision in Satpal Singh (Supra) is of no avail, as the said case pertained to recovery of huge commercial quantity of drug under the NDPS Act.

The parameters which govern the grant or refusal of bail in a case like instant one, as reiterated by the Supreme Court in *Ranjitsing Brahmajeetsingh Sharma Vs. State of Maharashtra & Anr.* (2005) 5 SCC 294 are as under:-

"43. Section 21(4) of MCOCA does not make any distinction between an offence which entails punishment of life imprisonment and an imprisonment for a year or two. It does not provide that even in case a person remains behind the bars for a period exceeding three years, although his involvement may be in terms of Section 24 of the Act, the court is prohibited to enlarge him on bail. Each case, therefore, must be considered on its own facts. The question as to whether he is involved in the commission of organised crime or abetment thereof must be judged objectively. Only because some allegations have been made against a high-ranking officer, which cannot be brushed aside, may not by itself be sufficient to continue to keep him behind the bars although on an objective consideration the court may come to the conclusion that the evidences against him are not such as would lead to his conviction. In case of circumstantial evidence like the present one, not only culpability or mens rea of the accused should be prima facie established, the court must also consider the question as to whether the circumstantial evidence is such whereby all the links in the chain are complete.

44. The wording of Section 21(4), in our opinion, does not lead to the conclusion that the court must arrive at a positive finding that the applicant for bail has not

committed an offence under the Act. If such a construction is placed, the court intending to grant bail must arrive at a finding that the applicant has not committed such an offence. In such an event, it will be impossible for the prosecution to obtain a judgment of conviction of the applicant. Such cannot be the intention of the legislature. Section 21(4) of MCOCA, therefore, must be construed reasonably. It must be so construed that the court is able to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. Similarly, the court will be required to record a finding as to the possibility of his committing a crime after grant of bail. However, such an offence in futuro must be an offence under the Act and not any other offence. Since it is difficult to predict the future conduct of an accused, the court must necessarily consider this aspect of the matter having regard to the antecedents of the accused, his propensities and the nature and manner in which he is alleged to have committed the offence.

45. It is, furthermore, trite that for the purpose of considering an application for grant of bail, although detailed reasons are not necessary to be assigned, the order granting bail must demonstrate application of mind at least in serious cases as to why the applicant has been granted or denied the privilege of bail."

Upon considering the case set up against petitioner in the complaint in question in its totality, I find that broad probabilities of this case justify release of petitioner on bail. Without commenting on the merits of this case, it is directed that petitioner be admitted to bail subject to his furnishing bail bond in the sum of Rs. 1,00,000/- with two local sureties in the like amount to the satisfaction of the trial court/ duty Metropolitan Magistrate (MM). Needless to say, any observations made herein shall have no bearing on the merits of the case at trial.

A copy of this order be given dasti under the signatures of Court Master to counsel for the parties.