(2022) 01 DEL CK 0049

In the Delhi High Court

Case No : Bail Application No. 3156 Of 2021

Rajeev Sharma APPELLANT

Vs

Directorate Of Enforcement RESPONDENT

Date of Decision : 07-01-2022

Acts Referred:

Official Secrets Act,1923 — Section 3, 4, 5
Indian Penal Code, 1860 — Section 120B, 411
Code Of Criminal Procedure, 1973 — Section 167(2)
Prevention of Money Laundering Act, 2002 — Section 3, 4, 45, 45(1), 50

Citation : (2022) 01 DEL CK 0049

Hon'ble Judges : Mukta Gupta, J

Bench : Single Bench

Advocate : Mohit Mathur, Avi Singh, Aditya Singh, Shubham Singh, Anubhav Singh, Karan Dhalla, Vinayak Chitale, Harsh Gautam, S.V.Raju, Amit Mahajan, Zoheb Hossain, Mohd. Faraz, Vivek Gumani

Final Decision : Disposed Of

Judgement

,,,

Mukta Gupta, J",,,

1. By this petition, the petitioner seeks regular bail in ECIR/05/STF/2021 recorded by the respondent pursuant to the predicate offence(s) being FIR",,,

No. 230/2020 registered at P.S.Special Cell under Sections 3/4/5 of the Official Secrets Act and Section 120B IPC.,,,

2. Learned counsel for the petitioner contends that the petitioner is a senior freelance journalist aged 61 years old, suffering from various ailments and",,,

has represented premier news agencies like United News of India (UNI), The Tribune, Free Press Journal, Sakal Times and Enadu. The petitioner",,,

has also written various books and is a journalist accredited by Press Information

Bureau, Govt. of India. The petitioner worked as a freelance",,,

journalist for Chinese newspaper i.e. Global Times from the year 2014 to 2016 and during this employment as a journalist, the petitioner used to send",,,

and receive emails from his aforesaid employer which are all easily available in public domain. In connection with the predicate offence being FIR No.,,,

230/2020 registered at P.S.Special Cell, the petitioner was arrested for the offences punishable under Sections 3/4/5 of the Official Secrets Act on",,,

14th September 2020 and was released on default bail in terms of Section 167(2) Cr.P.C on 4th December 2020 as the charge sheet/complaint had,,,

not been filed within the statutory period. On 26th February 2021, the respondent recorded the above-noted ECIR and directed the petitioner to join",,,

the investigation which he joined several times till 1st July 2021. The premises of the petitioner was searched and seizures affected, however, nothing",,,

except sixteen visiting cards were recovered. In the above-noted ECIR, the petitioner was arrested on 1st July 2021 for offences punishable under",,,

Sections 3/4 of PMLA and is in custody since then.,,,

3. Learned counsel for the petitioner contends that the offences punishable under the Official Secrets Act not being the Scheduled Offences under the,,,

PMLA, ECIR recorded by the respondent and the arrest made pursuant to that as also the complaint filed is without any jurisdiction. It is further",,,

contended that even otherwise, as per the complaint of the respondent, the proceeds of the crime attributable to the petitioner amount to Rs.",,,

48,20,788.50 paisa and in terms of Proviso to Section 45 of the PMLA de-hors the decision of the Honâ??ble Supreme Court in (2018) 11 SCC 1",,,

titled as Nikesh Tarachand Shah Vs. Union of India, the twin conditions as applicable in Sub-Section (1), clauses (i) and (ii) will not be applicable as",,,

the proceeds of the crime even as per the respondent is less than Rs. 1 Crore. Further, even for arriving at the proceeds of the crime for a sum of Rs.",,,

48,20,788.50 paise, an entry of Rs. 14 lakhs has been repeated. Reliance is also placed on the decision reported as 2021 SCC Online Kerala 395 titled",,,

M.Sivasankar Vs. Union of India. to contend that since the amount involved is less than Rs. 1 Crore, the Proviso to Section 45 of the PMLA would be",,,

applicable.,,,

4. Thus, as held by the Gujarat High Court in the decision reported as R/Criminal Misc. Application No. 2774 of 2021 decided on 6th May 2021 titled",,,

as Pasumarthi Venkata Satyanarayana Sarma Vs.The Assistant Director, Enforcement Directorate, for grant of bail only three factors are required to",,,

be satisfied i.e. flight risk, tampering with the evidence and influencing the witnesses. The petitioner is citizen of India, his wife is a Professor in the",,,

JNU and he has roots in the society. There is no allegation that the petitioner has either tampered with the evidence or influenced any witness. The,,,

petitioner having been on bail for the offences under the provisions of Official Secrets Act from 4th December 2020 to 1st July 2021 and regularly,,,

joining the investigation, there is no material on record to show that the petitioner either tampered with the evidence or influenced the witnesses or is a",,,

flight risk.,,,

5. It is contended that the material which was required to be collected has already been collected from the petitioner by the prosecuting agency and,,,

the trial is likely to take substantial time. Till date, no cognizance has been taken for the offences punishable under Sections 3/4/5 of the Official",,,

Secrets Act. The petitioner has given explanation for all his foreign trips and how the payments for the said trips were made, either from his account",,,

or from his wifeâ??s account or by credit card. Contention of the respondent that the offence involved is a serious offence cannot be accepted,,,

because the offences under the Official Secrets Act are not notified as Schedule Offences under the PMLA. Further any alleged discrepancy in the,,,

Income Tax Returns also cannot be the basis for proceeding against the petitioner under Sections 3/4 of the PMLA, for the reason, offences",,,

punishable under the Income Tax Act are also not notified as Scheduled Offences under the PMLA.,,,

6. Learned Additional Solicitor General of India has taken this Court through the relevant paragraphs of the complaint filed to contend that the,,,

petitioner is involved in a very serious and grave offence punishable under Official Secrets Act. It is contended that even if the provisions of the,,,

Official Secrets Act are not mentioned as Scheduled Offences under the PMLA, however, still, because the complaint is also for offences punishable",,,

under Sections 120B IPC and 411 IPC, proceedings under Section 3/4 of the PMLA have been rightly invoked. Even, based on the Proviso to Section",,,

45(1) of the PMLA, it is the discretion of the Court to grant bail to an accused and the accused cannot claim bail as a matter of right. The word used",,, in proviso to Section 45 of the PMLA is â??mayâ?? thus the accused does not get a right of bail but only gets a right for being considered for grant,,,

of bail. Reliance is placed on the decision of (1999) 4 SCC 621 State of Kerala vs. Babu & Ors. Petitioner is involved in a serious offence of,,,

espionage and was secretly giving the locations of the Indian Army to the enemy. It is contended that the petitioner gathered the information which,,,

could be either by theft or by criminal breach of trust and in either case, the same would invoke offence punishable under Section 411 IPC and the",,,

same being a Scheduled Offence, the petitioner can be proceeded with it on a complaint under PMLA. The petitioner is supported by Chinese",,,

nationals and thus, there is every likelihood that he will flee from the country. Since the petitioner was passing information qua the Indian Army, the",,,

same is a far more serious offence than an economic offence. Considering the allegations against the petitioner in the charge sheet filed under the,,,

provisions of Sections 3/4/5 of Official Secrets Act and Section 120B IPC, the charges are very serious and far worse than an economic offences.",,,

7. Rebutting the arguments of the learned Additional Solicitor General, learned Senior Counsel for the petitioner contends that the articles written by",,,

the petitioner are as â??South Asia Monitorâ?? of a Malaysian company which has not been made an accused. The other two co-accused alleged,,,

are not accused in the predicate offence and since the petitioner satisfies the requirements under the triple test for grant of bail, the petitioner be",,,

released on bail. As regards the contentions of the respondent that offences punishable under Sections 120B and Section 411 IPC having been,,,

invoked, the same being notified as Scheduled offences under the PMLA, the respondent has validly proceeded under the provisions of Sections 3/4 of",,,

PMLA, it is stated by learned counsel that Section 120B IPC has not been invoked substantively but along with the offences punishable under",,,

Sections 3/4/5 of the Official Secrets Act. Reliance is placed on the decision of the Honâ??ble Supreme Court in Opto Circuit India Limited Vs. Axis,,,

Bank, Crl.Appeal No. 102/2021 decided on 3rd February 2021. Further, even on a query raised from the concerned Ministry in relation to the so-called",,,

information published by the petitioner, the reply by the concerned department is that the information is not classified and provisions under Sections",,,

3/4/5 of the Official Secrets Act cannot be also invoked.,,,

8. In the complaint filed by the respondent against the petitioner alleging offences punishable under Sections 3/4 of the PMLA, it is stated that FIR No.",,,

230/2020 was registered on 13th September 2020 against Rajeev Sharma, a journalist residing in Pitampura and he was arrested on 14th September",,,

2020. On his disclosure, one Nepalese national Sher Singh @ Raj Bohara and a Chinese national Qing Shi, who were working with one MZ Mall Pvt.",,,

Ltd. being run by Chinese nationals, were arrested. Section 120B IPC in the case being a Scheduled Offence, the investigation was taken up by the",,,

respondent after recording of the ECIR/05/STF/2021 on 26th February 2021. It is alleged that in the investigation in FIR No. 230/2020 registered at,,,

P.S.Special Cell, a secret information was received that the petitioner was going to supply the secret information to some unknown persons near Press",,,

Club of India, Raisina Road and the petitioner was apprehended at Main Mathura Road, Pillar No. 172, near Metro Station, Patel Nagar. It is claimed",,,

S.No.,Date,Destination,Mode of payment

1.,07.06.2016,Bhutan,"Trip with Family Friends. Payment

made in cash to organizer of the trip.

2.,22.06.2016,Kunming City,Indian Overseas Bank (Cheque No.298821)

3.,09.09.2016,Laos,Union Bank (Cheque No.00038)

4.,01.07.2017,Dubai,"Visa Payment- Union Bank (Cheque No.22495)

Tickets purchased by Credit Card

5.,23.11.2017,Singapore,"Went with brother and family. Visa Payment- Indian

Overseas Bank (Cheque No.207163) + Union Bank

(Cheque No.00087)

Tickets purchased by Credit Card. Lodging is Club

Mahindra by Pratima Vyas' brother.

6.,21.01.2019,"Nepal, Kunming

City","Payment organized by SAM-work trip for holding an

interview by SAM

7.,21.03.2019,Dubai,Tickets purchased by credit card.

8.,15.05.2019,Malaysia,Union Bank (Cheque No.000103)

9.,07.06.2019,Indonesia,"Organized with a group of friends. Paid via Union

Bank (Cheque

No.53991)

the complaint filed by the respondent before the learned Trial Court, Section 411 IPC being the predicate offence has not been mentioned. This plea",,,

has been taken by the learned Additional Solicitor General during the course of arguments. Further, even taking the allegations on their face value, the",,,

proceeds of crime are less than Rs.1 Crore.,,,

14. Section 45 of the PMLA reads as under:-,,,

â??45. Offences to be cognizable and non-bailable.â?",,,

(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 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 byâ?",,,

(i) the Director; or,,,

(ii) any officer of the Central Government or a 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.â??,,,

15. In Nikesh Tarachand Shah (supra), the Honâ??ble Supreme Court struck down the twin conditions mentioned in Section 45 of the PMLA. The",,,

amendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term â??offence punishable for 3 yearsâ?? with â??offence,,,

under this Actâ??. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment as held by this Court in,,,

Bail Appln. 249/2019 titled as Upendra Rai Vs. Directorate of Enforcement. The twin conditions under Section 45 of the PMLA not being applicable,",,,

the triple test is required to be applied so as to consider grant of bail to the petitioner. Though learned Additional Solicitor General has strenuously,,,

argued that since the petitioner has connection with Chinese handlers and intelligence agencies, he is a serious flight risk, however, the petitioner is an",,,

Indian citizen, his wife is also an Indian citizen employed in JNU and thus, has roots in society. There is no allegation against the petitioner that after",,,

being released on default bail in FIR No. 230/2020 registered at Special Cell on 4th December 2020 till 1st July 2021, the petitioner either tampered",,,

with evidence or influenced any witness. The petitioner joined the investigation as and when directed prior to 1st July 2021 before arrest.,,,

16. Learned Additional Solicitor General has laid great emphasis on the ground that the petitioner is involved in a very serious offence of passing on,,,

the information relating to Indian Army to the Chinese nationals thereby compromising with the national security. However, by this petition the",,,

petitioner does not seek bail for offences punishable under Sections 3/4/5 of the Official Secrets Act but for offences punishable under Section 3/4,,,

PMLA. Considering that the predicate offence, if any, against the petitioner is under Section 120B IPC and Section 411 IPC only and the proceeds of",,,

the crime which are alleged to be laundered are a sum of Rs. 48,20,788.50 paisa and that the petitioner has been in custody now for nearly six months,",,,

this Court deems it fit to grant bail to the petitioner.,,,

17. It is therefore directed that the petitioner be released on bail on the following conditions:-,,,

(i) The petitioner will furnish a personal bond in the sum of Rs. 5 lakhs with two surety bonds of the like amount, subject to the satisfaction of the",,,

learned Trial Court, out of which, one surety would be a family member of the petitioner;",,,

(ii) The petitioner will surrender his passport to the learned Trial Court;,,,

(iii) The petitioner will not leave the country without the prior permission of the Court concerned;,,,

(iv) In case of change of residential address and/or mobile number, the same will be intimated to the Court concerned by way of an affidavit;",,,

(v) The petitioner will appear before the Investigating Officer on the first Monday of every calendar month at 5 pm for the next six months.,,,

18. Petition is disposed of.,,,

19. Order be uploaded on the website of this Court.,,,

CRL.M.B.1095/2021 (interim bail),,,

In view of the order passed in Bail Appln. 3156/2021, the application is disposed of as infructuous.",,,