
(2019) 08 BOM CK 0001

In the Bombay High Court

Case No : Criminal Appeal No. 156, 919 Of 2019, Criminal Application No. 892 Of 2019

Vaidyalingam Hariharan

APPELLANT

Vs

State Of Maharashtra

RESPONDENT

Date of Decision : 02-08-2019

Acts Referred:

Maharashtra Protection Of Interest Of Depositors (In Financial Establishments) Act,
1999 — Section 4
Constitution Of India, 1950 — Article 21

Citation : (2019) 08 BOM CK 0001

Hon'ble Judges : Indrajit Mahanty, J;A.M. Badar, J

Bench : Division Bench

Advocate : Sanjeev Kadam, Sabeena Mahadik, Pankaj Uttaradhi, Sgar Hate,
Mangesh Avhale, Rebecca Gonsalvez, M.M. Deshmukh

Final Decision : Disposed Off

Judgement

Indrajit Mahanty, J

1] The Appellant has sought to challenge the impugned order dated 6th December, 2018 passed by the learned Special Judge, MPID Court, while directing issuance of Non Bailable Warrant (NBW) against the appellant in Miscellaneous Application No.1462 of 2018 arising out of MPID Special Case No.1 of 2014.

2] When notices were issued in this Appeal, objections were raised on behalf of the prosecution to the effect that the Appellant had alternate remedy to apply for cancellation of warrant before the MPID Court, Mumbai and consequently the Appellant was granted liberty to move the MPID Court seeking cancellation of NBW.

3] Criminal Appeal No. 919 of 2019 has come to be filed by the Appellant seeking to impugn the order dated 27th June, 2019 passed by the learned Special Judge,

MPID Court, rejecting the prayer made by the appellant seeking cancellation of NBW issued in the matter.

4] Since both the matters were interconnected, with the consent of parties, both the matters are taken up for disposal by this common Judgment.

5] The essential question that arises for consideration in the present case is, as to whether the learned Special Judge, MPID Court was justified in issuing NBW against the Appellant vide order dated 6th December, 2018. On perusing the Appeal Memo we find that the prosecution had moved an application before the learned Special Judge under MPID Act, which was registered as Miscellaneous Application No.1462 of 2018 arising out of CR No.89 of 2013 (MPID Special Case No.1 of 2014). In this application, it was alleged that the appellant was a whole time Director of NSEL from 18th May 2005 to 21st June 2011 and was also a "key management person". The application also indicates that the prosecution had learnt that the appellant had left the country to look after Singapore Exchange of Financial Technologies Singapore PTE Ltd., a subsidiary company of M/s. 63 Moon Technologies Ltd. (Earstwhile FTIL). It was further alleged that the Appellant was responsible for all criminal activities of NSEL including illegal pair contracts, not keeping sufficient stocks in NSEL Godowns, fictitious trades on NSEL platform, misuse of SGF fund. He was in loop through email with CEO Mr.Anjani Sinha and others while taking important decisions and thus his day to day involvement in day to day affairs of the company. It was alleged that the appellant was one of the absconding accused and though the Investigating Officer had tried to contact the appellant through various modes of communication but same proved to be futile. It was also alleged that API Om Wangate visited the residence of the appellant at Mumbai, where inquiries were made and at the relevant time his house was under lock and key; similarly the watchman and secretary of the society were also queried, but they were not in a position to provide any material information, however the Secretary Mr.Ramesh Jokhani provided the appellant's latest email address and mobile number available in the society office. It was alleged that email was sent on the address provided by the Secretary; and the appellant was also tried to be contacted on mobile number which was shown as switched off. Whenever the appellant was contacted on telephone number his phone was switched off.

6] Mr.Kadam, learned counsel for the appellant submitted that the following facts of the case :

i] It is stated in this Appeal that the Appellant had joined the Financial Technologies India Limited (FTIL) as an employee as Chief Technology Officer where he worked in such capacity till April, 2005 where after the Appellant was appointed as Director-Strategy (Non-Board) of the said company. It is also averred that the Appellant was appointed as Non executive Director on the Board of National Spot Exchange Limited (NSEL) as a nominated by FTIL and worked as such from 18th May 2005 to 20th December, 2011 and he resigned from the said non executive directorship of NSEL on 20th December, 2011. It is further averred

that the Appellant shifted to Singapore in the month of May 2011 and was appointed as Interim Chief Executive Officer of Singapore Mercantile Exchange Pte. Ltd. for six months and the said M/s. SNX was subsidiary of FDIL. The appellant was confirmed as CEO of SMX on 8th December, 2011 and was given additional responsibility as CEO of SMX Publications Pte. Ltd. from 21st December, 2012 and had been acting as advisory to various corporate entities in Singapore as well as in United States. It is further averred that the Appellant shifted from Singapore to United States in June, 2014.

ii] The Appellant was served with the show cause notice under Section 4 of the MPID Act, 1999 seeking attachment of his properties in connection with MPID Case No.1/2014. The appellant entered appearance in the said proceeding through Advocate before the designated Court and the EOW sent notice to the Appellant through e-mail dated 1st December, 2015 serving copy of the application for provisional attachment upon the Advocate for the Appellant. In the said attachment proceeding the appellant had affirmed the reply to the said notice at Singapore and the same was filed before the learned Special Judge at Exhibit 98 in MPID Special Case No.1/2014 and further that the said application remains pending for consideration.

7] Mr.Kadam, learned counsel on behalf of the appellant submitted that the impugned order of order of issuance of NBW was passed without application of judicial mind and in a mechanical manner. He asserts that the affidavit filed by Shri Prabhakar Babaji Loke, Assistant Commissioner of Police, Economic Offences Wing, NSEL SIT, Mumbai dated 5th March, 2019, clearly indicates that the prosecution was aware that the appellant had left the country in the year 2011, whereas, the FIR giving rise to the investigation and initiation of the present proceeding under the MPID Act was admittedly filed on 30th September, 2013 before MRA Marg Police Station. In the said affidavit in para 10 it is also indicated as follows :

"Hence, it became necessary to interrogate him.". Once the investigator decided to interrogate the appellant, the following steps appear to have been taken by them :

a] One API Om Wangate and Police Hawaldar Kadam were deputed to check the address of the appellant at Mumbai on 8th September, 2018. Since the flat was found locked, they carried out inquiries with the building supervisor and Secretary of the Society who revealed that the appellant had not visited the said flat for several days and that his wife occasionally visited the said flat. The said Police Officer further obtained information regarding cellphone number of the Appellant which as +1120104924556 and email id as "vaidya.hariharan99@gmail.com".

b] Once such information was available to the investigators, the EOW attempted, albeit unsuccessfully to contact the appellant on mobile phone no. +1120104924556.

c] On 3rd November, 2018 an email was sent to the appellant requesting his presence to examine him in order to facilitate investigation of EOW CR no.89/2013, but the appellant did not contact the investigator either by telephone or by email, for which reason it became necessary for the investigating authorities to file Miscellaneous Application No.1462 of 2018 in MPID Special Case NO. 1 of 2014 before the MPID Court, Mumbai on 28th November, 2018, seeking issuance of NBW against the appellant in order to secure his presence.

8] In response to the aforesaid facts, the appellant has asserted that he resigned from NSEL on 20th December, 2011, where after he left for Singapore and thereafter was working in United States since June 2014. It is submitted on behalf of the appellant that prior to the issuance of NBW, a proceeding had already been initiated under MPID Act seeking provisional attachment of certain immovable assets of the appellant on 6th October, 2015. It is further averred on behalf of the appellant that the appellant had entered appearance on 30th November, 2015 through his Advocate in the said proceeding and the appellant had also submitted his reply, affidavit of which was affirmed by the appellant at Singapore and submitted before the MPID court through Counsel on 16th December, 2015.

9] Mr. Kadam, learned counsel for the appellant also submits that if for any reason the investigating authority required the presence of the appellant and or details of his present whereabouts including his address and telephone number etc. such information could have been obtained from the counsel of the appellant, who has already appeared on his behalf in a parallel proceeding relating to attachment of his immovable property pending before the selfsame court i.e. Special Judge, MPID Court Mumbai. He also asserts that the appellant has never any intention of non-cooperation in the investigation and he further submits as follows :

i] Insofar as the investigating authorities attempted to try and contact the appellant over his cellphone is concerned, it is submitted on behalf of the appellant that the phone number on which the investigating authorities tried to contact the appellant was erroneous inasmuch as it appears that the investigating authorities tried to contact the appellant on mobile number with international direct dial prefix of Argentina instead of country code of USA since the phone number mentioned in the report of the officers who had obtained such information has an "additional digit"., therefore, the appellant could not be contacted by the investigating authorities.

ii] Insofar as non-response to the email is concerned, after learning of the issuance of NBW against him, the appellant checked his email account and noticed that the mail sent by the investigating officers dated 3rd November 2018, was parked in "spam folder" and hence it was not noticed by the appellant. Since the appellant was being represented through counsel in the attachment proceeding before the MPID Court itself the EOW (Investigating Officer) was aware of the email id of the appellant's Advocate through whom earlier notice

had been sent to the appellant. Consequently, it is submitted that without resorting to the same process no presumption could have been drawn that the appellant was seeking to evade or avoid appearance before the investigating officer.

10] It is further submitted on behalf of the appellant that this Court was pleased to grant interim directions vide order dated 8th April, 2019, wherein, this Court recorded the submissions made on behalf of the appellant stating that he would come to Mumbai on 15th May, 2019 and would appear before the Investigating Officer for the purpose of investigation.

11] It is submitted that in compliance of the said submission, the appellant came to India on 11th May 2019 and appeared before the learned Special Judge on 15th May, 2019 and thereafter attended the office of respondent on various dates including on 15th May 2019, 16th May 2019, 17th May 2019, 18th May 2019, 20th May 2019, 21st May 2019, 27th May 2019, 30th May, 2019, 7th June 2019, 8th June 2019, 11th June 2019, 12th June 2019 and 14th June 2019. Thereafter also he appeared before the investigating officers on 4th July 2019 and 11th July 2019. It is submitted on behalf of the appellant that the appellant has complied with the requirements of law by participating in the investigation and consequently the NBW issued against him ought to be quashed.

12] In support of his prayer in Criminal appeal No. 919 of 2019 challenging the order of learned Special Judge, MPID Court dated 27th June 2019 passed in MPID Case No.1 of 2014, rejecting request of the appellant to recall warrant issued against him, Mr. Kadam submits that the learned Special Judge rejected prayer of the appellant essentially on the ground that the appellant was a "Greencard holder" residing in United States and consequently since the allegations made against NSEL were very serious and on finding that the appellant was a "key management person" of the said company and further obtaining the presence of the appellant for further investigation would be difficult. This order is challenged as being erroneous and opposed to the rights of an individual to seek both livelihood as well as liberty enshrined under Article 21 of the Constitution of India.

13] In response to the aforesaid contention advanced by the learned counsel for the appellant, learned APP has strenuously opposed the prayers and submitted that as steps have not been taken by the investigating officers to ensure the presence of the appellant for the purpose of investigation, the appellant would not have made himself available for the purpose of investigation into the matter. She further submits that if the prayer of the appellant is allowed and NBW issued against him is quashed, it would be extremely difficult for the prosecution to once again obtain presence of the appellant. Therefore, learned APP strenuously opposed the prayer of the appellant.

14] In response to the aforesaid submission, learned counsel for the appellant submitted an affidavit of undertaking to the following facts :

" I, Vaidyalingam Hariharan, aged 60 years, the appellant abovenamed, do hereby solemnly affirm, state and undertake as under :

1] I say that am currently residing at United State of America since 2014. My detailed contact details are as below :

Sr. No.

Name & Residential Address at USA

Mobile No.

Email address

Passport No.

1

Vaidyalingam Hariharan 18 Park Apartments, 1143, Jersey City, New Jersey, USA 07302

+1(201) 492-4556

vaidya.hariharan99 @gmail.com

S8723969

2] I say that I have always shown my willingness to co-operate with the investigating authority. I have attended the office of Respondent (15-16) times from May 15, 2019 till date, as and when called upon by the concerned officer of Respondent. I undertake to attend the office of Respondent as and when called upon by the Respondent. I will make myself available in Mumbai for investigation and to attend the office of Respondent within three weeks from the date of receipt of the notice in that regard from Respondent.

3] I further undertake to co-operate with the Respondent for investigation and will provide all the information whichever I have in respect of the matter. I also undertake that in case of any urgency I am ready to make myself available for investigation through video conference.

4] I say that as stated I have been staying at USA since 2014. My residential flats and other properties are in Mumbai and are under the attachment of Government of Maharashtra under MPID Act. I say that details and value of the flats are as below :

Sr. No.

Land/Bldg./ Flat

Particulars

Area (sq.ft)

Valuation Approx(Rs.)

1

Flat

B/503/504, Plot No.104, Dosti Elite, Sion, Near Telephone Exchange, Sion Circle, Mumabi - 400 022

940

5,00,00,000/-

2

Flat

1001, Satguru Paman, Plot No.95, 15 Road, Pali Naka, Bandra (West), Mumbai.

1508

10,00,00,000. -

I undertake that I will not transfer the ownership rights in the abovesaid flats till the investigation against me in the matter is completed.

5 a I say taht I am ready and willing to furnish surety of two people to secure my presence in the investigation before respondent. The details of the sureties are as below :

Sr. No.

Name, occupation & address

Adhar details

Relationship

Contact details

1

Mr.Muraleedharan AV Asst. Amnager - Membership, Multi Commodity Exchange of India Ltd. Res. Add. Raunak CHS Ltd. B402, Plot No.883-886 and 964-969, Sector 20, Belapur, Navi Mumbai 400 614. Office Address - Exchange Square, Suren Road, Andheri (East), Mumbai 400093.

881730004047

Friend

Mb. No.99302676 75 Email Muralikannan 9@gmail.com

2

Dr.Ananda Narayanan Vaidyalingam M.D., MBBS,. DGO, Consulting Gynecologist at Edappal Hospitals Res. Address- Prashanthi Nilayam, Pottambi Road, Edappal P.O. 679576 Malapuram Dist,. Kerala

707732334758

Brother

Mb No.98470137 88

b Additionally I am ready and willing to deposit Rs.5,00,000/- in fixed deposit towards cash security till the process of surety is completed.

15] In the light of the submissions recorded hereinabove, it now becomes essential for us to consider the submissions advanced by both the parties. In this respect, it would be essential for us to take note of the judgment of the Hon'ble Supreme Court in the case of Inder Mohan Goswami and another vs. State of Uttaranchal and others (2007) 12 SCC 1,. The Hon'ble Apex Court in the said judgment had occasion to deal with the issue of personal liberty and interest of the State and the observations read thus :

Personal liberty and the interest of the State

50. Civilised countries have recognised that liberty is the most precious of all the human rights. The American Declaration of Independence, 1776, French Declaration of the Rights of Men and the Citizen, 1789, Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, 1966 all speak with one voice - liberty is the natural and inalienable right of every human being. Similarly, Article 21 of our Constitution proclaims that no one shall be deprived of his liberty except in accordance with procedure prescribed by law.

51. The issuance of non-bailable warrants involves interference with personal liberty. Arrest and imprisonment means deprivation of the most precious right of an individual. Therefore, the courts have to be extremely careful before issuing non-bailable warrants.

52. Just as liberty is precious for an individual so is the interest of the society in maintaining law and order. Both are extremely important for the survival of a civilised society. Sometimes in the larger interest of the public and the State it becomes absolutely imperative to curtail freedom of an individual for a certain period, only then the non-bailable warrants should be issued.

Further the issue "when non -bailable warrants should be issued" has also been dealt with by the Hon'ble Supreme court which has been dealt with by the Hon'ble Supreme court in para Nos.53 and 54, which has been reaffirmed in the case of Raghuvansh Dewanchand Bhasin vs. State of Maharashtra & Anr. (2012) 9 SCC 791

When non-bailable warrants should be issued.

53. Non-bailable warrant should be issued to bring a person to court when summons or bailable warrants would be unlikely to have the desired result. This could be when :

. it is reasonable to believe that the person will not voluntarily appear in court; or

. the police authorities are unable to find the person to serve him with a summon; or

. it is considered that the person could harm someone if not placed into custody immediately.

54. As far as possible, if the court is of the opinion that a summon will suffice in getting the appearance of the accused in the court, the summon or the bailable warrants should be preferred. The warrants either bailable or non-bailable should never be issued without proper scrutiny of facts and complete application of mind, due to the extremely serious consequences and ramifications which ensue on issuance of warrants. The court must very carefully examine whether the criminal complaint or FIR has not been filed with an oblique motive.

16] In the light of the Judgment of the Hon'ble Apex Court referred hereinabove, certain basic facts have been stated in the Affidavit of Investigating Officer which needs to be take note of the fact :

[i] the trading on the NSEL continued smoothly until mid July 2013.

[ii] FIR was filed before the MRA Marg Police Station on 30th September, 2013.

[iii] first charge sheet was submitted on 6th January 2014 and the case was numbered as MPID special case no.1/2014.

[iv]supplementary charge sheet was filed on 4th June 2014 and the case was numbered as MPID Special Case No.6/2014.

[v]Further supplementary charge sheet was filed on 4th August 2014 and the case was registered as MPID Special Case No.10/2014 and thereafter most importantly.

[vi] On 27th December, 2018 a supplementary charge-sheet was filed and the case was numbered as MPID Special Case No.5/2019.

17] In the light of the facts as noted hereinabove, it would be most important to take note herein that in none of the charge-sheets mentioned by the prosecution, the appellant has not been shown or named as an "accused" and most importantly while NBW was issued on 6th December 2018 against the appellant even then in the supplementary charge sheet filed subsequent thereto on 27th December, 2018, the appellant has been indicated as an accused. Of course, it needs to be noted that in the said charge sheet the investigating officers have noted that the investigation is still in progress against the erstwhile Directors of NSEL and other companies.

18] It is well settled by the Hon'ble Supreme court in the case law cited hereinabove that it is incumbent upon the Court to strike a balance between the individual's rights, liberties and privileges on one hand, and the State as representative of the community/polity, on the other. It is also noted in the aforesaid judgment that execution of NBW directly involves curtailment of liberty

of a person, a warrant of arrest cannot be issued mechanically, but only after recording satisfaction, that in the facts and circumstances of the case it is warranted. The Hon'ble Apex Court has reiterated that the courts have to be extra-cautious and careful while directing issuance of non-bailable warrant, else a wrongful detention would amount to denial of constitutional mandate envisaged in Article 21 of the Constitution of India. It is further held that it is for the Court concerned to assess the situation and exercise discretion judiciously, dispassionately and without prejudice.

Therefore, it is essential in order to maintain the rule of law and to keep the society in functional harmony, it is necessary to strike a balance between an individual's rights, liberties and privileges on the one hand and the State on the other.

19] Keeping in mind the aforesaid guidelines as directed by the Hon'ble Supreme court and in particular taking into account the fact that the appellant has complied with his undertaking made before this Court and has appeared on several dates as indicated in para 11 above before the Investigating Officer, we also take into consideration the Affidavit/Undertaking filed by the appellant dated 23rd July, 2019 and as noted hereinabove, we are of the considered view that in the present fact situation, necessary steps required to be taken by the investigating authorities to summon a person in the present case were wholly inadequate. The Investigators were fully aware that the appellant had left India in the year 2011; that they had initiated necessary steps to attach the immovable assets of the appellant and the appellant was contesting that matter and had appeared through Counsel. We are of the considered view that the telephone number on which attempts were made to contact the appellant was erroneous and the investigating officer should have also issued a summons by serving it through Counsel appearing for the appellant before selfsame court, of course in a parallel proceeding regarding attachment. It would also be important to note herein that although the appellant has been referred to as an accused in various paras of the affidavit filed by the investigating officer, yet admittedly, he has not been named as an accused in any of the charge sheets submitted till date. Even though investigation is still going on for more than six years and four supplementary charge sheets have also been filed.

20] Consequently, while the investigation is still in progress, we are of the considered view that issue of NBW in the present situation was wholly unnecessary, unjustified and result of non-application of judicial mind. Consequently, we direct quashing of order of issuance of NBW dated 6th December, 2018 and also the consequential order of rejection of appellant's application for recall dated 27th June, 2019.

21] In view of the above, keeping in view the necessity of investigation to arrive at an appropriate and just conclusion, we are further of the view that in terms of the undertaking submitted by the appellant quoted in Para 14 hereinabove, in the event, the presence of the appellant is required for further investigation in

the matter, investigating authorities may issue summons to the appellant at the address noted in the affidavit-cum-undertaking as well as through email indicated in para 1 and grant him adequate time to travel in order to remain present for investigation. With these observations and directions, Appeal Nos.156 of 2019 and 919 of 2019 stand disposed off. Accordingly, Criminal Application No.892 of 2016 also stands disposed off.