

ORDER BELOW EXH.217
IN
PMLA SPL. CASE NO.518 OF 2022

Versus

Directorate of Enforcement ... Prosecution

Ld. Sr. Counsel Mr. Aabad Ponda @ Ld. Counsel Mr. Sajal Yadav @
Ld. Adv. Aayushya Geruja, Ld. Adv. for applicant.
Mr. Sunil Gonsalves, Ld. Spl. PP.

DATE : May 29, 2024

ORDER

1. Accused No.4 Vyomesh Shah is seeking deletion of bail condition at Clause 2(iii) in the Order dt.07.06.2022 below Exh.12. ED strongly opposed the application vide say (Exh.217A) raising following objections,

- i The applicant (A4) is seeking review of the Order dt.07.06.2022 in the garb of this application.
- ii The Court has been gracious enough to permit him to travel abroad from time to time on the terms and conditions. Hence, there is no cause for this application.

- iii In the garb of the present application, the applicant (A4) intends to procure an omnibus order from this Court without any embargo on the acts of the applicant (A4) when there is no requirement as such.
- iv The applicant (A4) would be required to disclose the schedule or share itinerary. If the application is allowed the applicant may flee away from the jurisdiction and further conceal himself without making him available during the trial.
- v There is possibility of tampering with evidence.

With these objections, ED contended to reject the application.

2. Heard Ld. Sr. Counsel Mr. Aabad Ponda along with Ld. Counsel Mr. Sajal Yadav @ Ld. Adv. Aayushya Geruja for the applicant and Ld. SPP Mr. Sunil Gonsalves.

3. Relying on the law laid down by the Hon'ble Supreme Court recently in **Tarsem Lal Vs. Directorate of Enforcement Jalandhar Zonal Office [Criminal Appeal No.2608 of 2024 (Arising out of Special Leave Petition (Crl.) No.121 of 2024)]**, the applicant specifically contended that he (A4) is Managing Director of Hub Town Ltd. since 30.12.1996. He is Chartered Accountant having 30 years wide experience and expertise in the field of Construction, Finance and Property Development and also a co-founder of Hub Town Ltd. He being Managing Director of the company, his duty demands him to travel to different countries to explore new markets and find new customers, and get finances and investments on an urgent basis. For that, he has to travel frequently as well as extensively at short intervals, to various countries to meet various potential investors to discuss

investment opportunities in order to conduct his business properly and earn his livelihood.

4. It is further contended that, seeking permission every time to travel abroad, he has to file an application before the Court and wait for the say or reply of the ED and then for the pronouncement of the Order, which deprives him of business opportunities that can be availed in this very competitive market. Some times he has to extend his travel from different countries to different countries, which are not mentioned in the application for seeking permission to travel abroad. All this is causing great inconvenience to him. Therefore, he placed reliance on the recent authority of the Hon'ble Supreme Court in Tarsem Lal (supra).

5. I thoughtfully considered the contention and prayers made by the applicant (A4) and also the objections raised by ED.

6. Before discussing the merit of this application, I am constrained to note some past instances while dealing with accused persons who appeared before the Court responding the summons. It has happened that ED sometimes prefers not to arrest any accused under Sec.19 PML Act, but the name of such accused is mentioned in the Prosecution Complaint and after issuance of process summons used to be served upon such person. Responding such summons issued by the Court, such person (accused) appears before the Court. Previously and even today after such bonafide appearance, ED takes objection for his release. Previously there are instances wherein such accused when appeared bonafide before the Court responding its summons, was/were taken in judicial custody making their/his chance(s) of getting released

on bail difficult due to rigors of stringent twin conditions under Sec.45 PML Act. Such accused had to run from pillar to post i.e. the Hon'ble High Court and the Hon'ble Supreme Court. Eversince I took the charge of this Court and noticed this serious fact and on going through the provisions under Sec.19 r.w. Sec.45 PML Act, formed a view that if any person is not arrested by the ED under Sec.19 PML Act, he cannot be taken into judicial custody when appears bonafide before the Court responding its summons. Thereafter, this Court had continuously passed Orders holding that if ED has not arrested any person under Sec.19 PML Act, such person need not apply under Sec.45 PML Act but his appearance has to be entertained as per Sec.88 Cr.P.C. and he should be released forthwith on personal bond with or without sureties.

7. In many previous Orders this Court has boldly observed and taken note as to how ED has been trying to get their work done through the Court when they themselves failed to do it, i.e. arrest of accused under Sec.19 PML Act and garb their failure in not doing the same at appropriate time. I have also made certain bold observations in many Orders under Sec.88 Cr.P.C. that until such person receives summons for his appearance before the Court after issuance of process, ED cannot resist his appearance and contend him to be taken in judicial custody. It is simply because it is the ED who basically allows such person to be scotfree without any apprehensions of his travelling abroad, tampering and hampering evidence, flight risk, apprehension of dealing with POC and assisting the said process etc. but for the first time when such person appears before the Court all such contentions and objections astonishingly crop up before the Court. So, this Court has repeatedly taken firm stand that, the Court cannot do what the ED basically failed to do. With such observations this Court has granted

release of persons almost in all PMLA Special Cases under Sec.88 Cr.P.C., who were never arrested by ED until filing of the Prosecution Complaint and even thereafter. Such consistent view taken by this Court since long has now got support from the law laid down by the Hon'ble Supreme Court in Tarsem Lal (supra).

8. This applicant Vyomesh Shah (A4) was admittedly never arrested by ED under Sec.19 PML Act. He appeared before the Court responding the summons bonafide and applied for his release vide application Exh.12, which was heavily opposed by the ED on various grounds mentioned in paragraph 4 of the said Order dt.07.06.2022 below Exh.12. In paragraph 5 of the said Order this Court took resort to the guidelines laid down in the Satender Kumar Antil Vs. Central Bureau of Investigation and Anr, (Misc. Application No. 1849 of 2021 in S.L.P (Crl.) No.5191 of 2021) and justified his appearance.

9. In paragraph 6 of the said Order dt.07.06.2022 below Exh.12 this Court noted the conduct of the applicant (A4) and also failure of ED to justify their contention while opposing the said application. In paragraph 7 of the said Order the Court has clearly interpreted Sec.19 and held that, if the applicant (A4) was not arrested under Sec.19 PML Act, question of applying Sec.45 PML Act does not arise. Admittedly, the ED has not challenged the said Order before the Hon'ble High Court and allowed it to become absolute and final, which is now supported by the law laid down by the Hon'ble Supreme Court in Tarsem Lal (supra).

10. If the ED was apprehensive of the flight risk, dealing with POC by the applicant (A4) and various objections raised in their say

(Exh.217A), either they would have arrested the applicant (A4) under Sec.19 or had challenged the Order Below Exh.12 dt.07.06.2022 before the Hon'ble High Court. ED did nothing, but harping the same objections which is legally not permissible.

11. Now, coming to the prayers made in this application, I am of the opinion that it is settled law that an accused has fundamental right to travel abroad. Certainly, he is required to take permission of the Court. It has to be noted that many accused persons involved in ED cases and who were never arrested under Sec.19 PML Act, have inevitable part of their life / profession to frequently and extensively travel abroad. Every time they have to apply to the Court for seeking permission of the Court. Certainly the Court cannot pass any order without hearing ED. ED raises typical objections of flight risk etc. for which they never thought to arrest the accused under Sec.19 PML Act. The Court has to wait for say of ED Officer because Ld. SPP dealing with the case wants it on record, which ultimately consumes time. In such scenario some times accused misses his travel programme and the very object of the application gets frustrated. Sometimes some accused who are frequent fliers for their profession like this applicant (A4), who has to travel some more countries than the countries applied for and permitted by the Court. They cannot travel to such new destination(s) but have to return India for making a fresh application. Sometimes in such situation also they cannot reach India, make application, get permission and then continue their travel to the next destination(s), simply because there is no such permission to continue their travel to the next destination(s). All this is causing great hardship and injustice to their valuable right.

12. Of course, the Court has imposed condition of taking permission to travel abroad in order to maintain balance and not to create such unusual situation wherein the person like the applicant (A4) cannot continue his travel to the next new destination simply for want of Court permission even if he was permitted for travelling to particular country(ies). This was not the true purport of granting application under Sec.88 Cr.PC. and recent dictum of the Hon'ble Supreme Court clearly indicates that the Court cannot pass such Orders which create hurdles in the liberty of accused persons who were not arrested under Sec.19 PML Act.

13. Another aspect requires consideration is the volume of trial and approximate duration of its conclusion which anyone can anticipate or estimate. The release of applicant (A4) under Sec.88 Cr.PC was to safeguard the trial. As per Sec.44(1)(c) PML Act the trial of PMLA case has to be simultaneously conducted with the trial of the case(s) related to the Scheduled Offence. In the instant case, the case related to the Scheduled Offence was pending in Jammu & Kashmir State and until the Court given direction to the ED, no step had been taken by the ED to commit the same, particularly when one of the accused Nihal Garware (A1) was undertrial prisoner. Therefore, huge time wasted in only recording appearances of accused and dealing with bail application of Nihal Garware (A1). Yesterday itself the case related to the Scheduled Offence has been committed to this Court under Sec.44(1)(c) PML Act. As noted above, no one can anticipate and estimate when the trial will begin and conclude, particularly when there are two voluminous cases, one the instant and another investigated by CBI, Delhi and Jammu & Kashmir. Volume of each case is extraordinary. In such situation every time forcing the applicant (A4) to make a fresh

application to the Court and seek permission for travelling abroad and if his professional activities warrant him to extend his travel beyond the schedule permitted by the Court, either to loose that opportunity or rush to the Court from the abroad and file a fresh application awaiting the say of the ED and the order of the Court, is nothing but only the hardship at the behest of the Court Order. Certainly this is not the true purport of the Order under Sec.88 Cr.P.C. and law laid down by the Hon'ble Supreme Court in Tarsem Lal (supra) recently.

14. Ld. SPP Mr. Sunil Gonsalves vehemently argued that the law laid down by the Hon'ble Supreme Court in Tarsem Lal (supra) cannot have retrospective effect. While making such argument Mr. Gonsalves, Ld. SPP could not point out whether the Hon'ble Supreme Court in Tarsem Lal (supra) has specifically laid down that it would have only prospective application and not retrospective. Secondly, the Court is not dealing with any application under Sec.88 Cr.P.C. or deciding whether the accused who appears before the Court responding summons of the Court is to be taken in custody or has to be released. Because in the instant case this stage has already gone and Order dt.07.06.2022 below Exh.12 passed by this Court have not challenged by the ED before the Hon'ble High Court. The only question in this application is whether to allow the prayer by modifying the Order dt.07.06.2022. According to ED that will amount reviewing the Order dt.07.06.2022 and also it would amount an omnibus order without any embargo etc.

15. Basically there is no substance in such argument and contention raised by the ED. Even otherwise, the law laid down by the Hon'ble Supreme Court in Tarsem Lal (supra) indicates serious question

whether Court can impose conditions on accused when he was not arrested under Sec.19 PML Act and bonafide responded the summons of the Court by appearing in the Court. So, it is clear that the Court cannot create a situation by its Order which would ultimately paralyze or become a clog in the way of fundamental right of the accused. Much argument is made on behalf of ED that if such application is allowed the accused will flee from justice etc. which are already referred above. To that, I am of the opinion that when ED itself has not found it essential to arrest the applicant (A4) under Sec.19 PML Act, but left him scotfree until his appearance under Sec.88 Cr.P.C., where such apprehension had gone? Hence, I am of the opinion that the Order passed by this Court if creates hurdles in the liberty and fundamental right of the applicant, the Court can modify the same, particularly when imposing such conditions are not necessary in view of the law laid down by the Hon'ble Supreme Court in the case of Tarsem Lal (supra). If the application is rejected, the Court has to consider the situation put forth by the applicant (A4).

16. Ld. SPP Mr. Sunil Gonsalves vehemently argued that if such application is allowed, it will give rise to the situation like Nirav Modi, Vijay Mallya, Mehul Chokshi etc. I thoughtfully examined this argument and felt it necessary to note that all these persons fled because of the failure of the Investigating Agencies concerned in not arresting them at proper time. On the contrary the applicant (A4) is bonafide appeared before the Court responding the summons and securing his release under Sec.88 Cr.P.C. and also applied many times for travelling abroad. It is the ED who had never arrested the applicant-accused under Sec.19 PML Act for all the apprehensions which are now capitalized for resisting this application. Hence, the case of the

applicant (A4) cannot be equated with the case of others like - Nirav Modi, Vijay Mallya, Mehul Chokshi etc.

17. This applicant is a frequent flyer and for his profession he has to travel all over the world. Sometimes he visits 2-3 countries and thereafter, has to extend his travel to some other countries. The time span between such travels is very short wherein he cannot return India, approach the Court and seek further extension of travel. In such situation, either he has to loose his opportunities simply because of the Order of the Court or if he (A4) continues his travel to new destination which is not a part of his application for permission, his travel would certainly amount breach of the permission granted by this Court and ED would certainly canvass this aspect. Therefore, in the interest of justice I am of the opinion that situation warrants to pass following order with the conditions in addition to conditions in Order dt.07.06.2022 below Exh.12, to safeguard the objections raised by ED. With this, following order is passed :-

ORDER

1. Application (Exh.217) is allowed.
2. Applicant is permitted to travel abroad during and until the conclusion of trial to any destination without any impediment of condition at clause 2(iii) of the Order dt.07.06.2022 below Exh.12 on following further conditions,
 - (i) every time while travelling as such, the applicant (A4) shall inform his travel schedule and programme to ED with required itineraries.

- (ii) if the ED notices any activity on the part of the applicant (A4) detrimental to their case and further investigation, they are at liberty to take appropriate proceedings in the Court.
- (iii) the applicant (A4) shall undertake that he will scrupulously appear in the Court for every date and if he is not able to attend the Court due to his foreign travels, shall file application for exemption through Ld. Advocate without fail.
- (iv) the applicant (A4) shall undertake to scrupulously undertake the crucial stages of trial of this case, so that his absence would not affect the progress of the trial.
- (v) if the applicant (A4) had already deposited cash security for his previous travels and has not withdrawn the same, the same shall continue for his all future travels.

Dt.: 29.05.2024



(M.G. Deshpande)
Designated as Special Court,
under the PML Act, 2002, Gr.Bombay

Signed on : 29.05.2024

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER”	
30.05.2024 at hours UPLOAD DATE AND TIME	(KISHOR PRAKASH SHERWADE) NAME OF STENOGRAPHER
Name of the Judge	HHJ M. G. DESHPANDE (COURT ROOM NO.16)
Date of pronouncement of judgment/order	29.05.2024
Judgment/order signed by P.O. on	29.05.2024
Judgment/order uploaded on	30.05.2024