Union Of India Through The Assistant Director Vs Kanhaiya Prasad

Court: Supreme Court Of India

Date of Decision: Feb. 13, 2025

Acts Referred: Constitution of India, 1950 â€" Article 20(3)
Code of Criminal Procedure, 1973 â€" Section 438, 439
Indian Penal Code, 1860 â€" Section 38, 120B, 378, 379, 406, 409, 411, 420, 467, 468, 471
Prevention of Money Laundering Act, 2002 â€" Section 2(1)(y), 3, 4, 17, 45, 50, 50(2), 50(3), 65, 71
Bihar Mineral, (Concession, Prevention of Illegal Mining, Transportation & Storage) Rule, 2019 â€" Section 39(3)

Hon'ble Judges: Bela M. Trivedi, J; Prasanna B. Varale, J

Bench: Division Bench

Advocate: Suryaprakash V.Raju, Zoheb Hussain, Annam Venkatesh, Arvind Kumar Sharma, Ranjit Kumar, Mohit Agrawal, M/S. SAA Chambers

Final Decision: Allowed

Judgement

Bela M. Trivedi, J

1. Leave granted.

2. The appellant-Union of India through the Enforcement Directorate has challenged the legality of the impugned judgment and order dated 06.05.2024

passed by the High Court of Judicature at Patna in Criminal Miscellaneous No. 17738/2024, whereby the High Court had allowed the said petition and

released the respondent Kanhaiya Prasad on bail, in connection with the Special Trial (PMLA) Case No. 8 of 2023 arising out of ECIR No.

PTZO/14/2023.

3. As per the case of the appellant-ED, some 20 FIRs were registered at the various Police Stations at Patna, Saran and Bhojpur Districts under

Sections 38, 120B, 378, 379, 406, 409, 411, 420, 467, 468 and 471 of IPC, and under Section 39(3) of the Bihar Mineral, (Concession, Prevention of

Illegal Mining, Transportation & Storage) Rule, 2019. It was alleged inter alia that M/s Broad Son Commodities Private Ltd and its Directors were

engaged in illegal mining and selling of sand without using the departmental pre-paid transportation E-challan, issued by the Mining Authority Bihar,

and thus had caused revenue loss of Rs.161,15,61,164/- to the Government Exchequer. Since the said FIRs contained Scheduled offences as defined

under Section 2(1)(y) of the Prevention of Money Laundering Act, 2002 (hereinafter referred to as the Ã¢â‚¬Ëœâ€™PMLAâ€™Ã¢â‚¬â„¢), an ECIR bearing

No. ECIR/PTZO/14/2023 dated 15.03.2023, addendum ECIR No. ECIR/PTZO/14/2023 dated 08.11.2023 and dated 04.05.2024 came to be

registered, and the investigation for the offences of Money Laundering was initiated.

4. During the course of investigation and pursuant to the information made available, search operations were carried out under Section 17 of PMLA at

the various locations and premises related with the said Company and its Directors, including four premises of Radha Charan Sah, (father of the

respondent). During the course of inquiry, the statements of the respondent-Kanhaiya Prasad, being son of the said Radha Charan Sah came to be

recorded on 01.09.2023 and 04.09.2023 under Section 50 of the PMLA. It has been alleged by the appellant-ED that thereafter the respondent was

issued summons to appear before the Directorate on 11.09.2023, 12.09.2023 and 13.09.2023, however, he failed to appear on the said dates. The

respondent thereafter was arrested at the ED, Patna Zonal Office, Bihar on 18.09.2023. On production of the respondent before the concerned court,

his custody was handed over to the appellant- ED on 22.09.2023.

5. From the documents seized from the premises of the Radha Charan Sah and from the statements recorded under Section 50 of the Witnesses, of

the respondent and of his father, it was found that the respondent-accused was actually involved in the process of concealing and the possession of

the proceeds of crime amounting to Rs.17,26,85,809/- which were used for carrying out the renovation work in the resort at Manali and for the

construction work of the school owned by his trust. It was also found that the respondent-accused had handled the said proceeds of crime and

transferred it by using hawala network for acquisition of the resort at Manali. It was also alleged that the entire work of family-owned LLPÃ¢â‚¬â„¢s and

of Maa Sharda Devi Buildings and Construction, was handled by the respondent to route the proceeds of crime generated by his father to portray it as

untainted money. The respondent thus had allegedly layered and laundered the proceeds of crime generated by his father, being a syndicate member

involved in illegal sale of sand using hawala network. The respondent also had allegedly concealed the proceeds of crime by way of purchasing

properties, carrying out renovation work and constructions in the family-owned trust property using the said proceeds of crime.

6. The appellant-ED therefore filed Prosecution Complaint against the respondent and other accused on 10.11.2023 for the offences under Section 3

read with Section 4 of the PMLA. The specific role of the respondent-accused has been mentioned in paragraph 11.6 of the said Prosecution

Complaint. The concerned PMLA Court had taken cognizance of the alleged offences on 10.11.2023.

7. The respondent filed the application being Criminal Misc. No.17738/2024 before the High Court of Judicature at Patna seeking regular bail in

connection with the said Prosecution Complaint registered as Special Trial (PMLA Case No.8/2023) before the Special Judge, PMLA. The said

application has been allowed by the High Court vide the impugned order.

8. The bone of contention raised by the learned counsel Mr. Zoheb Hussain appearing for the appellant-ED is that the impugned order passed by the

High Court is in the teeth of Section 45 of the PMLA as also of various pronouncements made by this Court with regard to the mandatory

requirement of the said provision. According to him, the High Court has thoroughly misinterpreted and misread the ratio of the judgments particularly

of the judgment of the three-judge bench in Vijay Madanlal Choudhary & Ors. Vs. Union of India & Ors. 2022 SCC OnLine 929, while holding

that the provisions of Article 20(3) of the Constitution shall prevail upon Section 50 of the PMLA. Mr. Zoheb Hussain relying upon the Prosecution

Complaint and other material on record submitted that there was a prima-facie case made out by the appellant against the respondent, and the offence

under the PMLA being very serious and grave, High Court had committed an error in granting bail to the respondent without considering the rigours of

Section 45.

9. However, the Learned Senior Counsel Mr. Ranjit Kumar appearing for the respondent relying upon the various decisions of this Court submitted

that the case against the respondent was made out by the appellant on the basis of inadmissible statements recorded under Section 50 of the PMLA,

and that the respondent having already been released on bail by the High Court considering the material placed on record, this Court should not

interfere with the impugned order. He further submitted that the respondent had cooperated with the ED during the course of enquiry, in as much as

the respondent had remained present pursuant to the summons issued under Section 50 of the PMLA on 01.09.2023 and 04.09.2023 and had also paid

the entire income-tax dues as were found to be allegedly due by the authorities.

10. At the outset, it hardly needs to be stated that the objective of the PMLA is to prevent money laundering which has posed a serious threat not only

to the financial systems of the country but also to its integrity and sovereignty. The offence of money laundering is a very serious offence which is

committed by an individual with a deliberate desire and the motive to enhance his gains, disregarding the interest of the nation and the society as a

whole, and such offence by no stretch of imagination can be regarded as an offence of trivial nature. The stringent provisions have been made in the

Act to combat the menace of money laundering.

11. Since, the entire controversy revolves around Section 45 of the PMLA, it would be beneficial to reproduce the said provision: -

Ã¢â‚¬Å“Section 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 op-pose 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 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 a 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 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.Ã¢â‚¬â€‹

12. It is well settled position of law that Section 45 of the PMLA starting with a non-obstante clause has an overriding effect on the general provisions

of the Code of Criminal Procedure in case of conflict between them. Section 45 imposes two conditions for the grant of bail to any person, accused of

an offence punishable for a term of imprisonment of more than 3 years under Part A of the Schedule. The two conditions are that (i) the prosecutor

must be given an opportunity to oppose the application for bail; and (ii) the Court must be satisfied that there are reasonable grounds for believing that

the accused person is not guilty of such offence and that he is not liable to commit any offence while on bail. As well settled, these two conditions are

mandatory in nature and they need to be complied with before the accused person is released on bail.

13. It is further required to be noted that Section 65 of PMLA requires that the provisions of Cr.P.C. shall apply insofar as they are not inconsistent

with the provisions of the PMLA and Section 71 provides that the provisions of PMLA shall have overriding effect notwithstanding anything

inconsistent therewith contained in any other law for the time being in force. Hence the conditions enumerated in Section 45 will have to be complied

with even in respect of application for bail made under Section 439 of Cr.P.C. Further, Section 24 provides that in case of a person charged with the

offence of money-laundering under Section 3, the Authority or Court shall, unless the contrary is proved, presume that such proceeds of crime are

involved in money-laundering. Therefore, the burden to proof that proceeds of crime are not involved in money laundering would lie on the person

charged with the offence.

14. The aforesaid position of law has been reiterated time and again in catena of judgments by this Court. To cite a few judgments are in case of

Gautam Kundu Vs. Directorate of Enforcement (2015) 16 SCC 1, Rohit Tandon Vs. Directorate of Enforcement (2018) 11 SCC 46, Tarun

Kumar Vs. Assistant Director Directorate of Enforcement (2023) SCC OnLine 1486, etc.

15. In case of Vijay Madanlal (supra), whereby the various provisions of the Act including Section 45 were sought to be challenged, it has been

specifically held:

Ã¢â‚¬Å“387Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦.The provision post the 2018 Amendment, is in the nature of no bail in relation to the offence of money laundering unless the twin conditions are

fulfilled. The twin conditions are that there are reasonable grounds for believing that the accused is not guilty of offence of money laundering and that he is not likely

to commit any offence while on bail. Considering the purposes and objects of the legislation in the form of the 2002 Act and the background in which it had been

enacted owing to the commitment made to the international bodies and on their recommendations, it is plainly clear that it is a special legislation to deal with the

subject of money laundering activities having transnational impact on the financial systems including sovereignty and integrity of the countries. This is not an

ordinary offence. To deal with such serious offence, stringent measures are provided in the 2002 Act for prevention of money laundering and combating menace of

money laundering, including for attachment and confiscation of proceeds of crime and to prosecute persons involved in the process or activity connected with the

proceeds of crime. In view of the gravity of the fallout of money laundering activities having transnational impact, a special procedural law for prevention and

regulation, including to prosecute the person involved, has been enacted, grouping the offenders involved in the process or activity connected with the proceeds of

crime as a separate class from ordinary criminals. The offence of money laundering has been regarded as an aggravated form of crime Ã¢â‚¬Å“world overÃ¢â‚¬. It is,

therefore, a separate class of offence requiring effective and stringent measures to combat the menace of money laundering.

388 to 411Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦..

412. As a result, we have no hesitation in observing that in whatever form the relief is couched including the nature of proceedings, be it under Section 438 of the

1973 Code or for that matter, by invoking the jurisdiction of the constitutional court, the underlying principles and rigours of Section 45 of the 2002 Act must come

into play and without exception ought to be reckoned to uphold the objectives of the 2002 Act, which is a special legislation providing for stringent regulatory

measures for combating the menace of money laundering.Ã¢â‚¬â€‹

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16. In view of the above, there remains no shadow of doubt that the consideration of the two conditions mentioned in Section 45 is mandatory, and that

while considering the bail application, the said rigours of Section 45 have to be reckoned by the court to uphold the objectives of the PMLA.

17. So far as facts of the present case are concerned, the High Court in a very casual and cavalier manner, without considering the rigours of Section

45 granted bail to the respondent on absolutely extraneous and irrelevant considerations. There is no finding whatsoever recorded in the impugned

order that there were reasonable grounds for believing that the respondent was not guilty of the alleged offence under the Act and that he was not

likely to commit any offence while on bail. Non-compliance of the mandatory requirement of Section 45 has, on the face of it, made the impugned

order unsustainable and untenable in the eye of law.

18. Though it was sought to be submitted by learned senior Advocate Mr. Ranjit Kumar for the respondent that the appellant had relied upon the

statements of the respondent recorded under Section 50 of the Act which were inadmissible in evidence, the said submission cannot be accepted in

view of the position of law settled by this Court in Vijay Madanlal (supra) in which it has been held inter alia that the person summoned under

Section 50(2) is bound to attend in person or through authorized agents before the authority and to state truth upon any subject concerning which he is

being examined or is expected to make statements and to produce the documents as may be required by virtue of sub-section (3) of Section 50. It has

been further observed that Article 20(3) of the Constitution would not come into play in respect of the process of recording statement pursuant to such

summon issued under sub-section (2) of Section 50. The phrase used in Article 20(3) is Ã¢â‚¬Å“to be a witnessÃ¢â‚¬ and not to Ã¢â‚¬Å“appear as a witnessÃ¢â‚¬. It

follows that the protection afforded to an accused insofar as it is related to the phrase Ã¢â‚¬Å“to be a witnessÃ¢â‚¬ is in respect of testimonial compulsion in

the court room, and it may also extend to compelled testimony previously obtained from him. It is available therefore to a person against whom a

formal accusation relating to the commission of an offence has been levelled, which in the normal course may result in a prosecution.

19. We also do not find any substance in the submission made by learned Senior Advocate Ranjit Kumar for the respondent that the respondent has

not been shown as an accused in the predicate offence. It is no more res integra that the offence of money laundering is an independent offence

regarding the process or activity connected with the proceeds of crime, which had been derived or obtained as a result of criminal activity relating to

or in relation to a schedule offence. Hence, involvement in any one of such process or activity connected with the Proceeds of Crime would constitute

offence of money laundering. This offence otherwise has nothing to do with the criminal activity relating to a schedule offence, except the Proceeds

of Crime derived or obtained as a result of that crime. The precise observations made in Vijay Madanlal (supra) in this regard may be reproduced

hereunder: -

Ã¢â‚¬Å“270. Needless to mention that such process or activity can be indulged in only after the property is derived or obtained as a result of criminal activity (a

scheduled offence). It would be an offence of money laundering to indulge in or to assist or being party to the process or activity connected with the proceeds of

crime; and such process or activity in a given fact situation may be a continuing offence, irrespective of the date and time of commission of the scheduled offence. In

other words, the criminal activity may have been committed before the same had been notified as scheduled offence for the purpose of the 2002 Act, but if a person

has indulged in or continues to indulge directly or indirectly in dealing with proceeds of crime, derived or obtained from such criminal activity even after it has been

notified as scheduled offence, may be liable to be prosecuted for offence of money laundering under the 2002 Act Ã¢â‚¬" for continuing to possess or conceal the

proceeds of crime (fully or in part) or retaining possession thereof or uses it in trenches until fully exhausted. The offence of money laundering is not dependent on

or linked to the date on which the scheduled offence, or if we may say so, the predicate offence has been committed. The relevant date is the date on which the

person indulges in the process or activity connected with such proceeds of crime. These ingredients are intrinsic in the original provision (Section 3, as amended

until 2013 and were in force till 31-7-2019); and the same has been merely explained and clarified by way of Explanation vide Finance (No. 2) Act, 2019. Thus

understood, inclusion of clause (ii) in the Explanation inserted in 2019 is of no consequence as it does not alter or enlarge the scope of Section 3 at all.

271 to 405Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦Ã¢â‚¬Â¦

406. It was urged that the scheduled offence in a given case may be a non-cognizable offence and yet rigours of Section 45 of the 2002 Act would result in denial of

bail even to such accused. This argument is founded on clear misunderstanding of the scheme of the 2002 Act. As we have repeatedly mentioned in the earlier part of

this judgment that the offence of money laundering is one wherein a person, directly or indirectly, attempts to indulge or knowingly assists or knowingly is a party or

is actually involved in any process or activity connected with the proceeds of crime. The fact that the proceeds of crime have been generated as a result of criminal

activity relating to a scheduled offence, which incidentally happens to be a non-cognizable offence, would make no difference. The person is not prosecuted for the

scheduled offence by invoking provisions of the 2002 Act, but only when he has derived or obtained property as a result of criminal activity relating to or in relation

to a scheduled offence and then indulges in process or activity connected with such proceeds of crime. Suffice it to observe that the argument under consideration is

completely misplaced and needs to be rejected.Ã¢â‚¬â€‹

20. The High Court has utterly failed to consider the mandatory requirements of Section 45 and to record its satisfaction whether any reasonable

ground existed for believing that the respondent was not guilty of the alleged offence, and that he was not likely to commit any offence while on bail.

Merely because the prosecution complaint had been filed and the cognizance was taken by the court that itself would not be the ground or

consideration to release the respondent on bail, when the mandatory requirements as contemplated in Section 45 have not been complied with.

21. As well settled, the offence of money laundering is not an ordinary offence. The PMLA has been enacted to deal with the subject of money

laundering activities having transnational impact on financial systems including sovereignty and integrity of the countries. The offence of money

laundering has been regarded as an aggravated form of crime world over and the offenders involved in the activity connected with the Proceeds of

Crime are treated as a separate class from ordinary criminals. Any casual or cursory approach by the Courts while considering the bail application of

the offender involved in the offence of money laundering and granting him bail by passing cryptic orders without considering the seriousness of the

crime and without considering the rigours of Section 45, cannot be vindicated.

22. The impugned order passed by the High Court being in teeth of Section 45 of PMLA and also in the teeth of the settled legal position, we are of

the opinion that the impugned order deserves to be set aside, and the matter is required to be remanded to the High Court for fresh consideration.

Accordingly, the impugned order is set aside, and the matter is remanded to the High Court for consideration afresh with the request to the Chief

Justice to place the matter before the Bench other than the Bench which had passed the impugned order. We may clarify that we have not expressed

any opinion on the merits of the case.

23. Though, the learned Senior Counsel Mr. Ranjit Kumar has submitted that the respondent having already been released on bail, the same be

continued in a peculiar and piquant situation, we are not inclined to accept the said submission. The impugned order passed by the High Court having

been held to be unsustainable and untenable by us, the effect of the same cannot be continued. The respondent shall surrender before the Special

Court within one week from today.

24. The Appeal stands allowed accordingly.