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*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: 19th October 2023

\+ W.P.(CRL) 2416/2023

ASHISH MITTAL ..... Petitioner

Through: Mr. Mohit Mathur, Senior Advocate with Mr. Shikhar Sharma, Mr. Mayank Sharma and Mr. Harsh Gautam, Advocates.

versus

DIRECTORATE OF ENFORCEMENT & ANR. ..... Respondents

Through: Mr. Anupam S. Sharma, Special Counsel with Mr. Prakarsh Airan, Ms. Harpreet Kalsi, Mr. Ripudaman Sharma, Mr. Abhishek Batra and Mr. Vashisht Rao, Advocates for Respondents/ED.

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

J U D G M E N T

ANUP JAIRAM BHAMBHANI J.

W.P.(CRL) 2416/2023 & CRL.M.A. 22727/2023

By way of the present petition filed under Article 226 of the Constitution of India read with section 482 of the Code of Criminal Procedure 1973 ('Cr.P.C.'), the petitioner/Ashish Mittal, seeks a direction quashing ECIR bearing No. ECIR/DLZO-I/04/2020

registered by the respondents/Directorate of Enforcement ('ED') on 04.03.2020. By way of the accompanying application bearing Crl. M.A. No. 22727/2023 filed under section 482 Cr.P.C. the petitioner seeks "*Stay of the entire proceedings emanating from the ECIR bearing No. ECIR/DLZO-I/04/2020 and now being investigated…*" by the ED; and a further direction that the ED be directed not to take any coercive steps against the petitioner curtailing his personal liberty.

Brief Background

2. The immediate provocation for the petitioner to approach the court is summons dated 18.08.2023 issued to him by the Assistant Director, Directorate of Enforcement, Chandigarh under section 50(2) and (3) of the Prevention of Money Laundering Act, 2002 ('PMLA'), requiring the petitioner to appear before the ED on 21.08.2023.

3. The petitioner states in the petition that he *"...has a strong apprehension that he will be illegally detained/arrested by the Respondents and he will be made a scapegoat in order to protect the interest of the main promoters/alleged main beneficiaries of the company …"*.[1]

4. Notably, a copy of the impugned ECIR has *not* been filed alongwith the petition. The petitioner says that he has not been supplied a copy of the impugned ECIR till date.

Relevant Factual Matrix

5. Briefly, the contours of the matter that are relevant for deciding the present petition are the following :

[1] cf. para 5 of the writ petition

5.1. The impugned ECIR is stated to have been registered by the respondents on the basis of an FIR bearing No. RCBD1/2020/E/0002 dated 10.02.2020 registered by the Central Bureau of Investigation ('CBI') under sections 120B read with sections 420/467/468/471 of the Indian Penal Code, 1860 ('IPC') and section 13(2) read with section 13(1)(d) of the Prevention of Corruption Act, 1988 at CBI, BSFB, Delhi, alleging the offences *inter-alia* of criminal conspiracy, cheating, forgery of valuable security, forgery for the purposes of cheating, using forged documents as genuine and criminal misconduct committed from the period 2012 onwards in relation to the affairs of one M/s. Educomp Solutions Ltd ('ESL'). The FIR was registered based on complaint dated 06.02.2020 made by the State Bank of India. The FIR names several persons as accused; however, the petitioner is *not* named as an accused in the FIR;

5.2. The impugned ECIR alleges the commission of the offence of 'money laundering' under sections 3 and 4 of the PMLA;

5.3. As recorded above, the impugned ECIR is not on record, since the petitioner says he does not have a copy thereof;

5.4. The petitioner was associated with ESL for about 3½ years, to begin with as the Senior Vice President (Finance) with effect from 01.11.2013; and thereafter as its Chief Financial Officer ('CFO') with effect from 26.05.2014. He contends that he was engaged as CFO for implementing a Corporate Debt Restructuring Scheme for ESL;

5.5. The petitioner contends that he was never a member of the Board of Directors of the company, nor was he part of any statutory committee including the Audit Committee, nor a shareholder of the company; and that he tendered his resignation from the company *vide* Resignation Letter dated 24.02.2018;

5.6. The petitioner also contends that all transactions during his tenure with the company happened with the consent and knowledge of the Monitoring Committee of the lender banks and/or the Resolution Professional appointed by the National Company Law Tribunal in the proceedings against ESL under the provisions of the Insolvency & Bankruptcy Code, 2016;

5.7. On another note, it is noted that the petitioner is also one of the accused in criminal complaint case bearing Ct. Case No. 990/2022 filed by the Serious Fraud Investigation Office ('SFIO') under sections 420/120B of the IPC, sections 211/628/227/233 of the Companies Act, 1956 and sections 129/447/448 of the Companies Act, 2013, in which case he was admitted to bail *vide* judgment dated 03.05.2023 in Bail Appl. No. 251/2023 titled ***Ashish Mittal vs. Serious Fraud Investigation Office***[2] after suffering custody for about 07 months.

6. Though notice had not yet been issued on the present petition, the respondents chose to file reply-affidavit dated 31.08.2023, by way of a pre-emptive response.

[2] 2023 SCC OnLine Del 2484

7. This court has heard Mr. Mohit Mathur, learned senior counsel appearing for the petitioner; as also Mr. Anupam S. Sharma, learned Special Counsel appearing for the respondents/ED. Written submissions have also been filed on behalf of the parties.

8. By way of a preliminary objection, Mr. Sharma has opposed the very *maintainability* of the present petition, submitting that the trigger for filing the present petition is *merely* a summons dated 18.08.2023 issued under section 50 of the PMLA and nothing more; and that it is settled law that a writ petition seeking stay or quashing of summons is not maintainable. Furthermore, Mr. Sharma submits, that in any event, the present petition is *premature* inasmuch as it is clear that the petitioner has *not been named in the FIR* registered by the CBI in relation to the scheduled/predicate offence under the scheme of the PMLA. Though neither the ECIR nor the prosecution complaint stated to have been filed pursuant thereto are on record, Mr. Sharma also confirms that the petitioner is *also not named as an accused in the ECIR or in the prosecution complaint* so filed.

9. Considering the preliminary objection raised, it was considered necessary to hear the parties first on the issue of *maintainability*.

10. On the issue of the petition being *not maintainable* and/or being *premature*, counsel on both sides have cited several judicial precedents, interpreting them in support of their respective propositions. However, to avoid multiplicity of decisions on the same point, only the most relevant and material judgments are being cited hereunder.

Discussion on Legal Landscape

Interim Relief against summons under Section 50 PMLA

11. As a general principle on entertaining a writ petition against a 'show-cause notice', relying on a series of earlier decisions, in ***Union of India vs. Kunisetty Satyanarayana***[3] the Supreme Court has held that the discretionary writ jurisdiction of the High Court under Article 226 of the Constitution of India should *not ordinarily* be exercised by quashing a show-cause notice *unless* it is found to have been issued by a person having no jurisdiction to do so, since a mere show-cause notice does not give rise to any cause of action. The Supreme Court has also held that mere issuance of a show-cause notice does not amount to an adverse order affecting the rights of any party. In this view of the matter, it has been held that since a writ petition lies when some right of a party is infringed, even *entertaining* a writ petition against a show-cause notice (or a chargesheet) may be premature.[4] To be clear, *Kunisetty Satyanarayana* (supra) was a case that arose from a service dispute and not from any criminal proceedings.

12. In ***Special Director vs. Mohd. Ghulam Ghouse***[5], which was a matter under the Foreign Exchange Regulation Act, 1973 and the Foreign Exchange Management Act 1999, the Supreme Court had this to say :

> *"3. According to the appellants, the writ petition is thoroughly misconceived as it challenges a show-cause notice and in any event the final relief as sought for by Respondent 1-writ petitioner in relation to the show-cause notice should not have been granted by an interim order of the nature passed by withholding any*

[3] (2006) 12 SCC 28

[4] *Ibid* at para 14

[5] (2004) 3 SCC 440

further action in this regard. It was pointed out that Respondent 1 is responsible for financial irregularities involving nearly Rs 270 crores and documents have been forged, accounts have been manipulated; and in any event Respondent 1 was free to canvass all the points that were taken in the writ petition before the authority issuing the notice. Instead of doing that, he rushed to the High Court and unfortunately the High Court not only entertained the writ application but also granted interim relief which was in effect allowing the writ petition even before it was heard on merits. The final relief sought for itself, in substance, was granted by the interim order. ..... The High Court should have thrown out the writ petition at the threshold.

* * * * *

"5 [Ed. : Para 5 corrected vide Corrigendum No. F.3/Ed.B.J./40/2004 dated 2-4-2004] . This Court in a large number of cases has deprecated the practice of the High Courts entertaining writ petitions questioning legality of the show-cause notices stalling enquiries as proposed and retarding investigative process to find actual facts with the participation and in the presence of the parties. ***Unless the High Court is satisfied that the show cause notice was totally non est in the eye of the law for absolute want of jurisdiction of the authority to even investigate into facts, writ petitions should not be entertained for the mere asking and as a matter of routine, and the writ petitioner should invariably be directed to respond to the show cause notice and take all stands highlighted in the writ petition.*** *Whether the show cause notice was founded on any legal premises, is a jurisdictional issue which can even be urged by the recipient of the notice and such issues also can be adjudicated by the authority issuing the very notice initially, before the aggrieved could approach the court. Further, when the court passes an interim order it should be careful to see that the statutory functionaries specially and specifically constituted for the purpose are not denuded of powers and authority to initially decide the matter and ensure that ultimate relief which may or may not be finally granted in the writ petition is not accorded to the writ petitioner even at the threshold by the interim protection granted."*

(emphasis supplied)

13. The above position has also been echoed in order dated 20.11.2014 made by the Supreme Court in ***Kirit Shrimankar vs. Union of India,***[6] where the petitioner had filed a writ petition under Article 32 of the Constitution of India expressing apprehension that he would be arrested. The apprehension arose from alleged threats of arrest extended by some officers in proceedings under the Customs Act, 1963 during a search conducted at the residential premises of the petitioner's ex-wife. In those circumstances, the Supreme Court found that the writ petition was *premature* and was based on flimsy averments, observing that such averments could not form the basis for a *prima-facie* apprehension of arrest. The writ petition in that case was thereupon withdrawn, with the Supreme Court observing as follows :

> *"3. ..... we are convinced that the petitioners can be permitted to withdraw these writ petitions with the right to work out their remedy as and when any appropriate situation arises for working out such remedy. ....."*

14. In the context of summons issued by the ED under section 50 of the PMLA, a Co-ordinate Bench of this court in ***Virbhadra Singh vs. Enforcement Directorate & Ors.,***[7] has observed as follows :

> *"143. ... The powers conferred on the enforcement officers for purposes of complete and effective investigation include the power to summon and examine* ***"any person"****. The law declares that every such person who is summoned is bound to state the truth.* ***At the time of such investigative process, the person summoned is not an accused****.* ***Mere registration of ECIR does not make a person an accused.*** *He may eventually turn out to be an accused upon being*

[6] (2018) 12 SCC 651

[7] 2017 SCC OnLine Del 8930

> *arrested or upon being prosecuted.* ***No person is entitled in law to evade the command of the summons issued under Section 50 PMLA on the ground that there is a possibility that he may be prosecuted in the future.*** *The law declared in Nandini Satpathy (supra) concerning the statements under Section 161 Cr.P.C. recorded by the police, and in other pronouncements concerning similar powers of officers of the Customs Department, as noted earlier, provide a complete answer to the apprehensions that have been expressed."*
>
> (emphasis supplied)

Arising from the foregoing perspective, the court held that there was nothing from which it could be inferred that the issuance of summons by the ED in exercise of its statutory powers of investigation into the ECIR, had caused or would have the effect of causing, any prejudice to the petitioners in those cases; and the petitions were accordingly dismissed as being devoid of substance.

15. On point of fact, it is common ground that in the present case, what the petitioner is aggrieved of is essentially the *potential threat of being arrested* on the basis of the summons received from the ED; for which reason he seeks quashing of the ECIR. The petitioner also seeks interim relief of *stay of* ***all*** *proceedings* emanating from the ECIR and against any coercive action that may be taken against him by the ED.

16. It is also the conceded position that the petitioner has neither been named as an accused in the ECIR; nor has he been named as an accused in the prosecution complaint stated to have been filed in the matter.

17. In this regard, a brief reference to the celebrated decision of the Supreme Court in ***State of Haryana vs. Bhajan Lal***[8] would be useful :

> *"102. In the backdrop of the interpretation of the various relevant provisions of the Code under Chapter XIV and of the principles of law enunciated by this Court in a series of decisions relating to the exercise of the extraordinary power under Article 226 or the inherent powers under Section 482 of the Code which we have extracted and reproduced above,* ***we give the following categories of cases by way of illustration wherein such power could be exercised either to prevent abuse of the process of any court or otherwise to secure the ends of justice****, though it may not be possible to lay down any precise, clearly defined and sufficiently channelised and inflexible guidelines or rigid formulae and to give an exhaustive list of myriad kinds of cases wherein such power should be exercised.*
>
> *(1)* ***Where the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused.***
>
> *(2) Where the allegations in the first information report and other materials, if any, accompanying the FIR do not disclose a cognizable offence, justifying an investigation by police officers under Section 156(1) of the Code except under an order of a Magistrate within the purview of Section 155(2) of the Code.*
>
> *(3)* ***Where the uncontroverted allegations made in the FIR or complaint and the evidence collected in support of the same do not disclose the commission of any offence and make out a case against the accused.***
>
> *(4) Where, the allegations in the FIR do not constitute a cognizable offence but constitute only a non-cognizable offence, no investigation is permitted by a police officer without an order of a Magistrate as contemplated under Section 155(2) of the Code.*

[8] 1992 Supp (1) SCC 335

> *(5) Where the allegations made in the FIR or complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused.*
>
> *(6)* ***Where there is an express legal bar engrafted in any of the provisions of the Code or the concerned Act (under which a criminal proceeding is instituted) to the institution and continuance of the proceedings and/or where there is a specific provision in the Code or the concerned Act, providing efficacious redress for the grievance of the aggrieved party.***
>
> *(7)* ***Where a criminal proceeding is manifestly attended with mala fide and/or where the proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused and with a view to spite him due to private and personal grudge.****"*
>
> (emphasis supplied)

As observed by the Supreme Court, the above categories of cases are only illustrative and not exhaustive.

18. However, it is apparent from the above that quashing of an FIR (or, as in the present case, an ECIR) must be based *primarily* on what the document itself contains.

19. It is significant to note that in the present case, what the petitioner seeks as the main relief, is the quashing of a document *viz.* the ECIR which is not even available with him. Nor has the ECIR been produced in court. Also, in ***Vijay Madanlal Choudhary and Others vs. Union of India and Others,***[9] the Supreme Court as held that since an ECIR is an internal document, it is not mandatory for the ED to furnish a copy of the ECIR to a person who is under investigation,

[9] 2022 SCC OnLine SCC 929 at paras 459 and 467 (xviii)(a)-(b)

muchless would that be the case for a person who has only been summonsed under section 50 of the PMLA.

20. Since the ECIR is not before the court, nor is the petitioner entitled as a matter of law, to be given a copy of the ECIR, there is obviously no way that the court can assess and evaluate the grounds on which the petitioner seeks quashing of the ECIR.

21. On the other hand however, the ED has categorically stated in their reply filed in these proceedings, that the petitioner is *not named as an accused* in the ECIR[10]; nor is he named as an accused in the scheduled offence registered by the CBI, which is the foundation of the proceedings in the ECIR. It also transpires in the course of submissions, that the petitioner had also been issued summons on 04 earlier occasions *i.e.*, on 29.01.2021, 15.06.2021, 27.07.2021, 18.08.2023 in this matter; but he has never been arrested pursuant to such summons.

22. It is also noteworthy that the impugned summons have been issued under section 50 of the PMLA, which provision therefore requires a closer look. It reads as under :

> ***50. Powers of authorities regarding summons, production of documents and to give evidence, etc****.—(1) The Director shall, for the purposes of Section 13, have the same powers as are vested in a* ***civil court*** *under the Code of Civil Procedure, 1908 (5 of 1908) while trying a suit in respect of the following matters, namely:—*
>
> *(a) discovery and inspection;*
> *(b) enforcing the attendance of any person, including any officer of a reporting entity, and examining him on oath;*
> *(c) compelling the production of records;*
> *(d) receiving evidence on affidavits;*
> *(e) issuing commissions for examination of witnesses and*

[10] cf. para 5 of Preliminary Submissions/Objections in ED's Reply dated 31.08.2023

documents; and

(f) any other matter which may be prescribed.

*(2) The Director, Additional Director, Joint Director, Deputy Director or Assistant Director shall have power to summon **any person** whose attendance he considers necessary whether to give evidence or to produce any records during the course of any investigation or proceeding under this Act.*

*(3) **All the persons** so summoned shall be bound to attend in person or through authorised agents, as such officer may direct, and shall be bound to state the truth upon any subject respecting which they are examined or make statements, and produce such documents as may be required.*

(4) Every proceeding under sub-sections (2) and (3) shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code (45 of 1860).

*(5) Subject to any rules made in this behalf by the Central Government, any officer referred to in sub-section (2) may impound and retain in his custody for such period, as he thinks fit, **any records** produced before him in any proceedings under this Act:*

Provided that an Assistant Director or a Deputy Director shall not—

(a) impound any records without recording his reasons for so doing; or

(b) retain in his custody any such records for a period exceeding three months, without obtaining the previous approval of the Joint Director.

(emphasis supplied)

23. To wit, section 50 of the PMLA confers upon specified officers of the ED, the powers vested in a civil court trying a suit; including the power to enforce the attendance of any person for recording statements on oath, with a mandate that any person so summonsed shall be bound to attend, to answer and make statements truthfully; to compel discovery, inspection and production of documents and records; and to impound and retain records, by giving reasons in writing.

24. *To be sure, the power to arrest is conspicuously absent in section 50 of the PMLA.*

25. Though section 19 of the PMLA empowers designated officers of the ED to arrest any person, subject to satisfying the conditions mentioned in that provision, it is clear that the power to arrest does not reside in section 50 nor does it arise as a natural corollary of summons issued under section 50.

26. For completeness, section 19 of the PMLA may also be extracted here:

> ***19. Power to arrest.***—*(1) If the Director, Deputy Director, Assistant Director or any other officer authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession, reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act, he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.*
>
> *(2) .....*
>
> *(3) Every person arrested under sub-section (1) shall, within twenty-four hours, be taken to a Special Court or Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:*
>
> *Provided that .....*
>
> (emphasis supplied)

27. The power under section 50 of the PMLA to issue summons to a person and to require the production of documents and record statements, which is akin to the powers of a civil court, is *different and distinct* from the power under section 19 to arrest a person. These are two separate and distinct provisions. The exercise of the powers

under one, cannot be restrained on the apprehension that it *could* lead to the exercise of powers under the other. If that is permitted, *any and every person summonsed under section 50* of the PMLA, to produce documents or give a statement on oath, could resist such summons expressing *mere apprehension* that he may face arrest at the hands of the ED, in exercise of the powers under section 19 of the PMLA. Such a position would be antithetic to the statutory scheme.

28. Based on the provisions and precedents referred-to above; on a bare perusal of section 50 of the PMLA under which summons have been issued to the petitioner; and the fact that the petitioner is not an accused in the proceeding under the PMLA, this court is not persuaded to agree with the petitioner's apprehension that he may be subject to coercive measures.

29. Furthermore, this court is of opinion that though the petitioner was arrested in related proceedings by the SFIO, which arrest was subject matter of Bail Appl. No. 251/2023, that is still not sufficient basis to infer that the petitioner would necessarily be made an accused in the proceedings under the PMLA.

30. On the other hand is the overarching principle that courts ought not to interfere with the functioning of law enforcement agencies to investigate an offence, founded on the precept that superior courts should not mechanically use their inherent powers and writ jurisdiction to interdict investigation and trial.[11]

31. That having been said, this court would be loath to simply brushing aside the petitioner's contention that apart from filing the present

[11] ***King-Emperor vs. Khwaja Nazir Ahmad***, (1943-44) 71 IA 203 at 212

petition, he has no other way of protecting himself from possible unlawful arrest at the hands of the ED and that he is remediless in law. This court is clear that *if it is indeed true* that the petitioner is remediless in relation to his grievance, a writ petition invoking the extraordinary plenary jurisdiction of this court under Article 226 of the Constitution would always lie.

Availability of remedy under section 438 Cr.P.C.

32. To satisfy its conscience in that regard, this court deems it necessary to briefly examine the statutory landscape and judicial precedents on the remedy available to the petitioner.

33. A meaningful reading of the decision in *Vijay Madanlal Choudhary* (supra), when it says that the underlying principles and rigours of section 45 of the PMLA, *viz.* the requirements of satisfying the additional twin conditions prescribed therein for obtaining bail, would apply equally to grant of bail under section 438 Cr.P.C., makes it clear that the remedy of applying for anticipatory bail under section 438 Cr.P.C. *is available* to the petitioner if he apprehends arrest under the PMLA. In any event, the opening words of section 438 Cr.P.C. : *"When any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence…*" (emphasis supplied) also show that the remedy embedded in that section is not restricted only to a person who is *named as an accused* in relation to a non-bailable offence.

34. The anxiety expressed on behalf of the petitioner in this regard however, is that in ***State of Gujarat vs. Choodamani Parmeshwaran***

Iyer,[12] the Supreme Court has held that a person summonsed under section 69 (*sic*, section 70) of the Central Goods & Service Tax Act, 2017 ('CGST Act') for recording his statement *cannot* invoke section 438 Cr.P.C. since no FIR gets registered before the power of arrest is invoked under section 69(1) of the CGST Act; and that therefore, such person can seek protection against arrest only by invoking the jurisdiction of the High Court under Article 226 of the Constitution of India; arguing therefore, that since no FIR is registered even under the PMLA, the petitioner would face the same impediment as in *Choodamani* (supra) and can only seek relief in writ proceedings. However, it may be noted that *firstly*, the observation by the 2-Judge Bench in *Choodamani* has been made in the context of the CGST Act; and *besides*, two separate Constitution Benches of 5-Judges each have in ***Gurbaksh Singh Sibbia vs. State of Punjab***[13] and in ***Sushila Aggarwal vs. State (NCT of Delhi)***[14] held that *there is no offence per-se which stands excluded from the purview of section 438 except offences mentioned in section 438(4) Cr.P.C.*, *viz.*, matters relating to certain sexual offences under the IPC. The relevant portions of the aforesaid two judgments are extracted below :

Gurbaksh Singh Sibbia vs. State of Punjab

> *"16. A close look at some of the rules in the eight-point code formulated by the High Court will show how difficult it is to apply them in practice. The seventh proposition says:*
>
> *"The larger interest of the public and State demand that in serious cases like economic offences involving blatant*

[12] 2023 SCC OnLine SC 1043

[13] (1980) 2 SCC 565

[14] (2020) 5 SCC 1

corruption at the higher rungs of the executive and political power, the discretion under Section 438 of the Code should not be exercised."

"17. ***How can the court, even if it had a third eye, assess the blatantness of corruption at the stage of anticipatory bail ? And will it be correct to say that blatantness of the accusation will suffice for rejecting bail, if the applicant's conduct is painted in colours too lurid to be true ?*** *The eighth proposition rule framed by the High Court says:*

"Mere general allegations of mala fides in the petition are inadequate. The court must be satisfied on materials before it that the allegations of mala fides are substantial and the accusation appears to be false and groundless."

Does this rule mean, and that is the argument of the learned Additional Solicitor General, that anticipatory bail cannot be granted unless it is alleged (and naturally, also shown, because mere allegation is never enough) that the proposed accusations are mala fide ? ***It is understandable that if mala fides are shown, anticipatory bail should be granted in the generality of cases. But it is not easy to appreciate why an application for anticipatory bail must be rejected unless the accusation is shown to be mala fide.*** *This, truly, is the risk involved in framing rules by judicial construction.* ***Discretion, therefore, ought to be permitted to remain in the domain of discretion, to be exercised objectively and open to correction by the higher courts. The safety of discretionary power lies in this twin protection which provides a safeguard against its abuse.***

"18. ***According to the sixth proposition framed by the High Court, the discretion under Section 438 cannot be exercised in regard to offences punishable with death or imprisonment for life unless, the court at the stage of granting anticipatory bail, is satisfied that such a charge appears to be false or groundless.*** *Now, Section 438 confers on the High Court and the Court of Session the power to grant anticipatory bail if the applicant has reason to believe that he may be arrested on an accusation of*

having committed "a non-bailable offence". ***We see no warrant for reading into this provision the conditions subject to which bail can be granted under Section 437(1) of the Code.*** *That section, while conferring the power to grant bail in cases of non-bailable offences, provides by way of an exception that a person accused or suspected of the commission of a non-bailable offence "shall not be so released" if there appear to be reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life.* ***If it was intended that the exception contained in Section 437(1) should govern the grant of relief under Section 438(1), nothing would have been easier for the legislature than to introduce into the latter section a similar provision.*** *We have already pointed out the basic distinction between these two sections.* ***Section 437 applies only after a person, who is alleged to have committed a non-bailable offence, is arrested or detained without warrant or appears or is brought before a court. Section 438 applies before the arrest is made and, in fact, one of the pre-conditions of its application is that the person, who applies for relief under it, must be able to show that he has reason to believe that "he may be arrested", which plainly means that he is not yet arrested.*** *The nexus which this distinction bears with the grant or refusal of bail is that in cases falling under Section 437, there is some concrete data on the basis of which it is possible to show that there appear to be reasonable grounds for believing that the applicant has been guilty of an offence punishable with death or imprisonment for life.* ***In cases falling under Section 438 that stage is still to arrive and, in the generality of cases thereunder, it would be premature and indeed difficult to predicate that there are or are not reasonable grounds for so believing.*** *The foundation of the belief spoken of in Section 437(1), by reason of which the court cannot release the applicant on bail is, normally, the credibility of the allegations contained in the first information report.* ***In the majority of cases falling under Section 438, that data will be lacking for forming the requisite belief. If at all the conditions mentioned in Section 437 are to be read into the provisions of Section 438, the transplantation shall have to be done without amputation. That is to say, on the reasoning of the***

High Court, Section 438(1) shall have to be read as containing the clause that the applicant "shall not" be released on bail "if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life"*. In this process one shall have overlooked that whereas, the power under Section 438(1) can be exercised if the High Court or the Court of Session "thinks fit" to do so, Section 437(1) does not confer the power to grant bail in the same wide terms The expression "if it thinks fit", which occurs in Section 438(1) in relation to the power of the High Court or the Court of Session, is conspicuously absent in Section 437(1).* ***We see no valid reason for rewriting Section 438 with a view, not to expanding the scope and ambit of the discretion conferred on the High Court and the Court of Session but, for the purpose of limiting it. Accordingly, we are unable to endorse the view of the High Court that anticipatory bail cannot be granted in respect of offences like criminal breach of trust for the mere reason that the punishment provided therefor is imprisonment for life.*** *Circumstances may broadly justify the grant of bail in such cases too, though of course, the court is free to refuse anticipatory bail in any case if there is material before it justifying such refusal.*

* * * * *

"21. ***The High Court says in its fourth proposition that in addition to the limitations mentioned in Section 437, the petitioner must make out a "special case" for the exercise of the power to grant anticipatory bail. This, virtually, reduces the salutary power conferred by Section 438 to a dead letter. In its anxiety, otherwise just, to show that the power conferred by Section 438 is not "unguided or uncanalised", the High Court has subjected that power to a restraint which will have the effect of making the power utterly unguided. To say that the applicant must make out a "special case" for the exercise of the power to grant anticipatory bail is really to say nothing.*** *The applicant has undoubtedly to make out a case for the grant of anticipatory bail. But one cannot go further and say that he must make out a "special case".* ***We do not see why the provisions of Section 438 should be suspected as containing something volatile or incendiary, which needs to be handled with the greatest care and caution imaginable. A wise***

exercise of judicial power inevitably takes care of the evil consequences which are likely to flow out of its intemperate use. Every kind of judicial discretion, whatever may be the nature of the matter in regard to which it is required to be exercised, has to be used with due care and caution. *In fact, an awareness of the context in which the discretion is required to be exercised and of the reasonably foreseeable consequences of its use, is the hallmark of a prudent exercise of judicial discretion.* ***One ought not to make a bugbear of the power to grant anticipatory bail.***

* * * * *

"27. It is not necessary to refer to decisions which deal with the right to ordinary bail because that right does not furnish an exact parallel to the right to anticipatory bail. ***It is, however, interesting that as long back as in 1924 it was held by the High Court of Calcutta in Nagendra v. King-Emperor [AIR 1924 Cal 476, 479, 480 : 25 Cri LJ 732] that the object of bail is to secure the attendance of the accused at the trial, that the proper test to be applied in the solution of the question whether bail should be granted or refused is whether it is probable that the party will appear to take his trial and that it is indisputable that bail is not to be withheld as a punishment.*** *.....*

* * * * *

"31. ***In regard to anticipatory bail, if the proposed accusation appears to stem not from motives of furthering the ends of justice but from some ulterior motive, the object being to injure and humiliate the applicant by having him arrested, a direction for the release of the applicant on bail in the event of his arrest would generally be made.*** *On the other hand, if it appears likely, considering the antecedents of the applicant, that taking advantage of the order of anticipatory bail he will flee from justice, such an order would not be made. But the* ***converse of these propositions is not necessarily true.*** *That is to say,* ***it cannot be laid down as an inexorable rule that anticipatory bail cannot be granted unless the proposed accusation appears to be actuated by mala fides****; and, equally, that* ***anticipatory bail must be granted if there is no fear that the applicant will abscond.*** *There are several other considerations, too numerous to enumerate, the combined*

effect of which must weigh with the court while granting or rejecting anticipatory bail. ***The nature and seriousness of the proposed charges, the context of the events likely to lead to the making of the charges, a reasonable possibility of the applicant's presence not being secured at the trial, a reasonable apprehension that witnesses will be tampered with and "the larger interests of the public or the State" are some of the considerations which the court has to keep in mind while deciding an application for anticipatory bail.*** *.....*

* * * * *

"37. Thirdly, ***the filing of a first information report is not a condition precedent to the exercise of the power under Section 438. The imminence of a likely arrest founded on a reasonable belief can be shown to exist even if an FIR is not yet filed."***

(emphasis supplied)

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"63. Clearly, therefore, where Parliament wished to exclude or restrict the power of courts, under Section 438 of the Code, it did so in categorical terms. Parliament's omission to restrict the right of citizens, accused of other offences from the right to seek anticipatory bail, necessarily leads one to assume that neither a blanket restriction can be read into by this Court, nor can inflexible guidelines in the exercise of discretion, be insisted upon — that would amount to judicial legislation.

* * * * *

"75. ***For the above reasons, the answer to the first question in the reference made to this Bench is that there is no offence, per se, which stands excluded from the purview of Section 438, except the offences mentioned in Section 438(4). In other words, anticipatory bail can be granted, having regard to all the circumstances, in respect of all offences.*** *At the same time,* ***if there are indications in any special law or statute, which exclude relief under Section 438(1) they would have to be duly considered****. Also, whether anticipatory bail should be granted, in the given facts and circumstances of any case, where the allegations relating to the*

commission of offences of a serious nature, with certain special conditions, is a matter of discretion to be exercised, having regard to the nature of the offences, the facts shown, the background of the applicant, the likelihood of his fleeing justice (or not fleeing justice), likelihood of cooperation or non-cooperation with the investigating agency or police, etc. There can be no inflexible time-frame for which an order of anticipatory bail can continue.

* * * * *

"Final Conclusions of the Court

91. In view of the concurring judgments of M.R. Shah, J. and of S. Ravindra Bhat, J. with Arun Mishra, Indira Banerjee and Vineet Saran, JJ. agreeing with them, the following answers to the reference are set out:

* * * * *

"92. ***This Court, in the light of the above discussion in the two judgments, and in the light of the answers to the reference, hereby clarifies that the following need to be kept in mind by courts, dealing with applications under Section 438 CrPC:***

92.1. Consistent with the judgment in Gurbaksh Singh Sibbia v. State of Punjab [Gurbaksh Singh Sibbia v. State of Punjab, (1980) 2 SCC 565 : 1980 SCC (Cri) 465], when a person complains of apprehension of arrest and approaches for order, the application should be based on concrete facts (and not vague or general allegations) relatable to one or other specific offence. The application seeking anticipatory bail should contain bare essential facts relating to the offence, and why the applicant reasonably apprehends arrest, as well as his side of the story. These are essential for the court which should consider his application, to evaluate the threat or apprehension, its gravity or seriousness and the appropriateness of any condition that may have to be imposed. ***It is <u>not</u> essential that an application should be moved only after an FIR is filed; it can be moved earlier, so long as the facts are clear and there is reasonable basis for apprehending arrest."***

(emphasis supplied)

35. It is argued however, that what *Gurbaksh Singh Sibbia* (supra) and *Sushila Aggarwal* (supra) lay-down are general propositions; but since PMLA is more akin to the regime under the CGST Act in that it does not contemplate the recording of an FIR but only filing of a complaint before the court, the recent observations of the Supreme Court in *Choodamani* (supra) would stand in the petitioner's way. It is further argued that since the Supreme Court has held that a person summonsed under section 50 PMLA is not an *accused* having the protection enshrined in Article 20(3) of the Constitution[15], and since section 438 Cr.P.C requires an 'accusation', the petitioner, who is not an accused but is only a person being summonsed under section 50 PMLA, he may not be entitled to file an application seeking anticipatory bail under section 438 Cr.P.C.

36. The answer to the above apprehension requires a closer reading of section 438 Cr.P.C. :

> ***438. Direction for grant of bail to person apprehending arrest.—****(1) Where any person has reason to believe that he may be arrested on accusation of having committed a non-bailable offence, he may apply to the High Court or the Court of Session for a direction under this section that in the event of such arrest he shall be released on bail; and that Court may, after taking into consideration, inter alia, the following factors, namely:—*
>
> *(i) the nature and gravity of the accusation;*
>
> *(ii) the antecedents of the applicant including the fact as to whether he has previously undergone imprisonment on conviction by a Court in respect of any cognizable offence;*
>
> *(iii) the possibility of the applicant to flee from justice; and*

[15] *Vijay Madanlal Choudhary* (supra) at para 449

(iv) where the accusation has been made with the object of injuring or humiliating the applicant by having him so arrested,

either reject the application forthwith or issue an interim order for the grant of anticipatory bail:

Provided that, where the High Court or, as the case may be, the Court of Session, has not passed any interim order under this sub-section or has rejected the application for grant of anticipatory bail, it shall be open to an officer in-charge of a police station to arrest, without warrant the applicant on the basis of the accusation apprehended in such application.

(1-A) Where the Court grants an interim order under sub-section (1), it shall forthwith cause a notice being not less than seven days notice, together with a copy of such order to be served on the Public Prosecutor and the Superintendent of Police, with a view to give the Public Prosecutor a reasonable opportunity of being heard when the application shall be finally heard by the Court.

(1-B) The presence of the applicant seeking anticipatory bail shall be obligatory at the time of final hearing of the application and passing of final order by the Court, if on an application made to it by the Public Prosecutor, the Court considers such presence necessary in the interest of justice.

(2) When the High Court or the Court of Session makes a direction under sub-section (1), it may include such conditions in such directions in the light of the facts of the particular case, as it may think fit, including—

(i) a condition that the person shall make himself available for interrogation by a police officer as and when required;

(ii) a condition that the person shall not, directly or indirectly, make any inducement, threat or promise to any person acquainted with the facts of the case so as to dissuade him from disclosing such facts to the Court or to any police officer;

(iii) a condition that the person shall not leave India without the previous permission of the court;

> *(iv) such other condition as may be imposed under sub-section (3) of Section 437, as if the bail were granted under that section.*
>
> *(3) If such person is thereafter arrested without warrant by an officer in charge of a police station on such accusation, and is prepared either at the time of arrest or at any time while in the custody of such officer to give bail, he shall be released on bail; and if a Magistrate taking cognizance of such offence decides that a warrant should issue in the first instance against that person, he shall issue a bailable warrant in conformity with the direction of the Court under sub-section (1).*
>
> *(4) Nothing in this section shall apply to any case involving the arrest of any person on accusation of having committed an offence under sub-section (3) of Section 376 or Section 376-AB or Section 376-DA or Section 376-DB of the Indian Penal Code (45 of 1860).*
>
> (emphasis supplied)

37. In the opinion of this court, section 438 Cr.P.C. does not require a formal accusation and the word '*may*' preceding the words '*be arrested*' and '*on accusation*' signifies that both the *arrest* and *accusation* are *anticipatory*. That is to that, *firstly,* an application under section 438 can only be filed by a person who is *yet to be arrested*.[16] *Secondly,* an application under section 438 can be filed irrespective of whether there is a formal accusation (*e.g.* FIR),[17] which in a case under the PMLA would mean whether or not there is a prosecution complaint.

38. Though a *person* can seek protection under Article 20(3) of the Constitution of India only *ex-post i.e.*, only after formally being made an accused[18], on the other hand a *person* can seek relief under section

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[16] *Gurbaksh Singh Sibbia* (supra) at paras 18, 38-39; *Sushila Aggarwal* (supra) at paras 7.1, 49, 52.13

[17] *Gurbaksh Singh Sibbia* (supra) at para 37; *Sushila Aggarwal* (supra) at paras 7.1, 52.12, 85.1, 92.1

[18] cf. ***Balkishan A Devidayal vs. State of Maharashtra***, (1980) 4 SCC 600 at para 70 and ***Nandini***

438 Cr.P.C *ex-ante i.e.*, prior to both *arrest* and *accusation*. To interpret the provisions of section 438 differently in the context of PMLA would be contrary to two Constitution Bench decisions of the Supreme Court in *Gurbaksh Singh Sibbia* (supra) and *Sushila Aggarwal* (supra), which expressly lay-down that the filing of an FIR, *viz.* formal accusation, is not a condition precedent for filing an application under section 438 Cr.P.C.

39. For completeness, it may also be noticed that section 65 of the PMLA makes the provisions of the Cr.P.C. applicable *inter-alia* to an arrest made under PMLA "… *insofar as they are not inconsistent with the provisions …*" of the PMLA. To be sure, though section 71 of the PMLA contains a *non-obstante* clause, there is nothing in the PMLA which restricts the court from granting relief under section 438 Cr.P.C. in an appropriate case. The only rider being that the twin conditions in section 45 of the PMLA will also have to be satisfied.[19] In the opinion of this court therefore, there is no requirement in law for a prosecution complaint to have been filed for a person to *maintain* an application under section 438 Cr.P.C. Save for the stringent twin-conditions contained in section 45 PMLA, there is no provision in the PMLA which modifies the provisions of section 438 Cr.P.C.

40. In fact it is the respondent's stand that the petition is not *maintainable since* the petitioner has no *locus standi* to seek quashing of an ECIR or the prosecution complaint in which he is not an accused. The

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Satpathy vs. PL Dani, (1978) 2 SCC 424 at para 21

[19] *Vijay Madanlal Choudhary* (supra) at paras 411-412, 467(xiii)(d)

respondent has also said that there is an alternate, efficacious remedy available to the petitioner, by way of an application seeking anticipatory bail under section 438 Cr.P.C., which remedy he would be entitled to seek *at the appropriate stage*.

41. Furthermore, this court would re-iterate that the power of arrest under section 19 of the PMLA is not untrammelled. The authorities do not have the power to arrest on their whims and fancies. There is a three-fold requirement that must be complied-with *before* arresting a person:

> *Firstly*, the Director must entertain a *reasonable* belief that the person arrested is guilty of an offence *under the PMLA*, and not under any other enactment;
>
> *Secondly*, the reasons for such belief must be recorded in writing; and
>
> *Thirdly*, such belief must be based on material that is in the Director's possession.

42. To add to those three-fold conditions, section 19 also requires the arresting officer to inform the person arrested of the grounds for arrest and to forward a copy of the order of arrest alongwith the material in his possession to the adjudicating authority "*... immediately after arrest of such person ...*". Then of course, there is also a requirement that the person arrested shall be produced before the concerned court within 24 hours of arrest, excluding the time necessary to take him from the place of arrest to the court. In its recent verdict in ***V. Senthil***

Balaji vs. State[20] the Supreme Court has expressly held that any non-compliance to the mandate of section 19(1) of the PMLA would *vitiate the arrest* itself; and also that compliance with section 19(2) is a solemn function which brooks no exceptions.

Conclusions

43. For the aforementioned reasons, this court does not deem it necessary to entertain the present writ petition seeking quashing of the impugned ECIR, *since the petition is premature*.

44. Once this court has held that an application seeking anticipatory bail *is* maintainable notwithstanding that the petitioner is not named as an accused in the ECIR or in the prosecution complaint, this court cannot delve into whether the concerned court before whom the application under section 438 Cr.P.C. is filed would, or would not, grant relief to the petitioner. Consequently, in view of the settled legal position, as reiterated by the Supreme Court in ***Neeharika Infrastructure Pvt. Ltd. vs. State of Maharashtra and Ors.***,[21] the question of granting any interim relief as prayed for by the petitioner does not arise.

45. This court would hasten to clarify that it is *not* the purport of the present decision that the High Court, in exercise of its jurisdiction under Article 226 of the Constitution, is *per-se* barred from entertaining a petition by a person who is not a named accused in a scheduled offence, or in a prosecution compliant arising from an ECIR. It can never be so, since that would derogate from the well settled position of law as enunciated in the celebrated decision of the

[20] 2023 SCC OnLine SC 934 at para 39

[21] 2021 SCC OnLine SC 315 at paras 67-71, 80(xvi)

Supreme Court in ***L. Chandra Kumar vs. Union of India***[22]. To be sure, any limits on the plenary powers of Constitutional Courts are only self-imposed, and there can be no "… *strait-jacket principles that can be said to have "cribbed, cabined and confined" ... the extraordinary powers vested under Articles 226 or 227 of the Constitution*".[23]

46. The petition is accordingly dismissed.

47. Pending applications, if any, also stand disposed-of.

ANUP JAIRAM BHAMBHANI, J

OCTOBER 19, 2023
ds

[22] (1997) 3 SCC 261 at paras 75, 78-79, 81, 90 99; cf. ***Surya Dev Rai vs. Ram Chander Rai***, (2003) 6 SCC 675 at para 29

[23] cf. ***BS Hari vs. Union of India***, 2023 SCC OnLine SC 413 at para 50