

CRM-M-35662-2021 (O&M)

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**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

CRM-M-35662-2021 (O&M)

Reserved on : 26.10.2021

Pronounced on : 27.10.2021

Shiv Lal Pabbi

...Petitioner

Versus

Directorate of Enforcement

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. Vikram Chaudhary, Sr. Advocate with
Mr. S. S. Gill, Advocate &
Mr. Keshavan Chaudhary, Advocate
for the petitioner.

Mr. S. V. Raju, Additional Solicitor General of India with
Mr. Zoheb Hossain, Special Counsel for ED,
Mr. Vishal Gupta, Advocate &
Mr. Vivek Gurnami, Advocate
for the respondent-ED.

Mr. Tanvir Joshi, AAG, Punjab.

ARVIND SINGH SANGWAN, J.

Prayer in this petition, filed under Section 439 Cr.P.C., is for grant of regular bail to the petitioner in case ECIR No. HQ-STF/15/2020 dated 07.09.2020, registered by the respondent-Enforcement Directorate, STF-HQ, New Delhi for an offence under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (*for short 'PMLA'*).

Brief facts of the case are that the aforesaid case is registered against petitioner Shiv Lal Pabbi at the instance of Enforcement Directorate, STF-HQ, New Delhi (*for short 'ED'*) on the ground that a letter

dated 29.12.2017 was received from the Ministry of Home Affairs, vide which the original letter dated 20.04.2017, sent by the Embassy of Netherlands was endorsed, wherein a request was made for legal assistance in the matter of petitioner Shiv Lal Pabbi and others for their involvement in money laundering as they were indulged in secret banking and were having various assets in Dubai and India. The letter further states that the offence registered by the Dutch Police corresponds to Sections 420 and 467 of the IPC, which are scheduled offences under Part “A” of the PMLA. On the basis of the same, the aforesaid case/ECIR was registered on 07.09.2020 by the ED as per Part “C” and Section 58 of the PMLA.

During investigation, it was found that the petitioner is involved in the acts of cheating and forgery in Netherlands by transferring of money of other persons through Hawala operations and earned commissions in the shape of cash. Statement of the petitioner and one Mukesh Sharma was recorded under Sections 17 and 50 of the PMLA, however, the petitioner did not disclose the details of the bank accounts held by him in India and sought time. Again, summons under Section 50 of the PMLA were issued to the petitioner on 06.07.2021 for appearance on 09.07.2021 to record his statement but he, through an email, requested for four weeks more time to collect the documents and on 17.07.2021, the petitioner was apprehended by the officials of Bureau of Immigration at New Delhi Airport in response to an LOC (Lookout Circular) dated 19.02.2021 as he was trying to board a flight in order to flee from India. Thereafter, he was produced before the Special Judge, CBI, Punjab, from where, he was remanded to ten days’ police custody and then, he was sent to

judicial custody.

Learned senior counsel for the petitioner has argued that the petitioner, who is aged about 63 years, is a Dutch National since 1982 and has come to India in February, 2021. It is also submitted that the petitioner has transferred certain assets for purchasing a property for the Cabbana Resorts in Punjab and in pursuance to a notice issued by the authorities under PMLA, the petitioner has appeared before them and has got recorded his statement. It is further submitted that in the month of February, 2021, search was also carried out at the premises of the petitioner and certain documents were taken in possession. Learned senior counsel has further submitted that since the authorities under PMLA can retain the documents for a period of 30 days, thereafter, an application was moved before the adjudicating authorities under Section 17(4) of the PMLA for extending the time and in the meantime, in pursuance to another notice, the petitioner appeared before the authorities.

Learned senior counsel further submitted that in the meantime, on the same set of charges, vide judgment dated 22.09.2020, the petitioner was convicted by the competent Court in Netherlands for a period of 44 months and the petitioner preferred an appeal, which was admitted and, therefore, as per the criminal procedure applicable to said country, the petitioner's sentence automatically stood suspended and he was not arrested.

Learned senior counsel has further argued that the petitioner, in the month of February, 2021, demanded the said documents back from the authorities and having failed to do so, the petitioner filed a civil writ petition bearing CWP No. 9987 of 2020 challenging the action of the

authorities under PMLA as well as the notices issued to petitioner and during the pendency of the said writ petition, the respondent-authorities never brought it to the notice of the Writ Court that any LOC has been issued against the petitioner.

Learned senior counsel has further submitted that after hearing both the sides, the judgment was reserved in the aforesaid writ petition on 12.07.2021 and in the meantime, the petitioner was arrested on 17.07.2021, therefore, the petitioner moved an application for withdrawal of the said writ petition to avail his appropriate remedy and the said writ petition was dismissed as withdrawn on 20.07.2021.

Learned senior counsel has further submitted that in fact the petitioner was not fleeing from the process of law, rather he had received summons from the District Public Prosecutor Office in Netherlands with regard to a confiscation case pending before the competent authority in Netherlands and the petitioner was directed to appear on 27.07.2021. In order to attend the said proceedings, the petitioner had booked the return tickets from 17.07.2021 to 05.08.2021, however, he was detained at the Airport.

Learned senior counsel further submitted that the entire process of arresting the petitioner, in pursuance to the LOC, which was never brought to the notice of the writ Court, is nothing but an attempt to overreach the proceedings of the Court as it is not the case of the PMLA authorities that at any point of time, any such information was conveyed to petitioner. It is also argued that the petitioner is an overseas citizen and without taking any transit remand, he was brought from New Delhi to

Mohali and even the grounds of arrest were not communicated to him.

Learned senior counsel has, thus, prayed for grant of regular bail to the petitioner on the grounds that since the request was made by the Netherlands authorities to provide mutual legal assistance for giving information regarding assets of the petitioner in India, qua which, a case was already pending in the Courts at Netherlands, wherein the petitioner was ultimately convicted for a period of 44 months, the prosecution of the petitioner in India amounts to double jeopardy.

Learned senior counsel has next argued that the petitioner has not committed any scheduled offence in India and the allegations of cheating and forgery, leveled in the remand application, are afterthought. It is further argued that even prior to his arrest, the petitioner has appeared before the ED on two-three occasions in between 06.07.2021 to 09.07.2021 and 13 documents were called from the petitioner including his ITR/Salary etc. and since the same were in Netherlands, the petitioner sought time to supply the said documents and in the meantime, when the petitioner received summons from the authorities in Netherlands, he booked his return flight to attend the said proceedings and bring the documents, which were required by the ED and there was no intention on the part of the petitioner to flee from the process of law. It is further submitted that the petitioner was unaware about the issuance of LOC as the same was intentionally not brought to the notice of the writ Court by the respondent-authorities, when the writ petition was pending.

Learned senior counsel further submitted that there is not material on record to believe that the petitioner is guilty of any offence. It is

also submitted that the petitioner, who is in judicial custody for the last more than three months, may be released on bail as even the investigation qua him is complete as per the chargesheet filed by the ED in September, 2021.

In reply, learned Additional Solicitor General of India, appearing for the respondent-ED, on the basis of the conclusion of investigation, has argued that the petitioner has earned huge amount in cash by way of underground bank/Hawala business in Netherlands, which was generated as commission to cover up his legitimate business and the petitioner, in conspiracy with co-accused Mukesh Sharma, has prepared certain documents, which amounts to tax evasion in Netherlands and also amounts to forgery, cheating and money laundering as no permission was taken by him in Netherlands. The operative part of the conclusion of investigation, which runs from para 19.1 to 19.8, is reproduced below”

“19.1 It has been established during the investigation that Shivilal Pabbi, with an intention to save taxes in the Netherlands and to cheat the Netherlands Authorities, incorporated a firm SM Fashion BV in Netherlands in the name of his childhood friend Mukesh Sharma, a resident of Phagwara, India. Mukesh Sharma was the owner of SM Fashion BV only on paper and the said form was managed and controlled by Shivilal Pabbi. Further, on 09.05.2005, Mukesh Sharma signed a power of attorney in Shivilal Pabbi's favour so tht the business operations of the company could be run by Shivilal Pabbi in the Netherlands. Shivilal Pabbi indulged in the transfer of money on behalf of other persons i.e. in Hawala operations or underground banking activity and earned commission in the form of cash. To hoodwink the

Netherlands Authority and to evade taxed in the Netherlands, he created a facade of legitimate business operations in the name of SM Fashion BV which was deliberately and fraudulently created in the name of an Indian citizen Mukesh Sharma. Shival Pabbi also used to cover of the business operations in SM Fashion BV to conduct underground banking.

19.2 Sh. Mukesh Sharma, Indian National also signed and executed a loan agreement for providing a loan of Euro 200,000 to Shival Pabbi even though no loan was actually extended by him to Shival Pabbi. Further, on behalf of SM Fashion BV, Sh. Mukesh Sharma also signed and executed a 'Deed of Sale of Assets and Liabilities' dated 31.12.2007 with Shival Pabbi and by virtue of his deed, purchased all the assets and liabilities of Shival Pabbi's business concern named Euromode. In reality, there was no money involved in the transactions shown in books on behalf of Sh. Mukesh Sharma and the transactions shown against payments to creditors and loan to Shival Pabbi from Mukesh Sharma was only a sham done for the purpose of book-keeping.

19.3 Shival Pabbi indulged in criminal offences having cross border implications as defined in Section 2 (1) (ra) (i) of the PMLA, 2002 read with Section 2 (1) (ia) and Part C of the PMLA, 2002. Criminal offences committed by him under corresponding laws in the Netherlands constitute offences under Sections 420 and 467 of the IPC which are specified in Part A of the Schedule of the PMLA and are thus covered under Part C of the PMLA, 2002.

19.4 The Hawala/underground banking operations in the Netherlands was run by Shival Pabbi under the cover of business operations of SM Fashion BV and the commission earned through this illegitimate Hawala

business in cash was then transferred by Shivlal Pabbi to his bank accounts in SBI Phagwara through Hong Kong and Dubai. Proceeds earned through this Hawala/underground banking operations were not declared to the Netherlands authority and the same after being laundered to India through Hong Kong and Dubai, were invested in M/s Mayfair resorts and M/s CIPL, Phagwara, Kapurthala, Punjab, India.

19.5 Income Tax Returns in respect of Shivlal Pabbi and his firm S.M. Fashion B.V., for the period 2008 to 2014 revealed that Shivlal Pabbi was drawing wages in the capacity of Manager in M/s S.M. Fashion B.V. even after having General Power of Attorney issued in his name by Mukesh Sharma and even after effectively owning and controlling operations of SM Fashion BV; and that he received Euro 2,80,095 over the period as wages from S.M. Fashion B.V. Further, during the same period S.M. Fashion B.V. continuously yielded losses totaling Euro 2,98,551.85. This finding corroborated the fact that Shivlal Pabbi had no legitimate means to earn such huge amount of money and then remit the same to India for investment; and that the amount transferred by him through Hawala from the Netherlands to Dubai and Hong Kong and thereafter to bank accounts in India was nothing else but proceeds of crime generated out of the criminal activities committed by him in the Netherlands.

19.6 It was also observed by the Netherlands authority that no payments relating to India were made during the period 2007 to 2015 from the Netherlands bank accounts and Shivlal Pabbi, his wife Marie Sharda Hiralal, or the sole proprietorship Euromode or SM Fashion BV. Further, during the analysis of bank accounts of Shivlal Pabbi and his family members maintained in SBI, Phagwara, no remittances from the Netherlands were

found to have been received in those accounts. This, therefore, further proves that fact that Shivlal Pabbi had no legitimate means to earn such huge amount of money and then remit the same to India for investment; and that the amount transferred to him through Hawala from the Netherlands to Dubai and Hong Kong and thereafter to bank accounts in India was nothing else but proceeds to crime generated out of the criminal activities committed by him in the Netherlands.

19.7 As explained above, investigation further revealed that Sh. Shivlal Paabi had committed large-scale criminal offences over a long period of several years, in this case involving banking without a permit (underground banking/hawala) and money laundering. Sh. Shivlal Pabbi had large sums of cash – the proceeds of crime – at his disposal. According to investigations, Pabbi appears to have played a central role in the management of money couriers, who, by order of Sh. Shivlal Pabbi, transported large sums of cash. Money generated i.e. proceeds of crime from his Hawala business was not reported to Netherlands government and the same was then transferred to the bank accounts of himself and his family members/friend, maintained in India through Hong Kong and Dubai. Proceeds of crime amounting to Rs. 3257.07 lakhs, in the form of foreign inward remittance from Hong Kong and Dubai were thus received in the bank accounts of the Shivlal Pabbi and his family members/friend.

19.8 The aforesaid proceeds of crime were used by Shivlal Pabbi with the help of Mukesh Sharma, Anil Chodha and Manoj Chodha for various purposes, the main purpose being investment M/s Mayfair Resorts - partnership firm of Shivlal & Hiralal Pabbi and Anil & Manoj Chodha and M/s Hyatt Resorts Pvt. Ltd. - a

company having equal shareholding of the Pabbi & Chodha brothers which later became M/s Cabbana Infrastructure Pvt. Ltd. The proceeds of crime were also used by them to repay the laon (along with interest thereon) that they had taken in other bank accounts against FCNR deposits. Shivilal Pabbi also transferred the proceeds of crime to their relatives & family friends who used the said proceeds of crime to further their business interests, repay loans to creditors and also to buy property.”

Learned counsel for the respondent has referred to Section 2 (ra) of the PMLA, which reads as under;

“offence of cross border implications means— (i) any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in Part A, Part B or Part C of the Schedule, had it been committed in India and if such person transfers in any manner the proceeds of such conduct or part thereof to India.

Learned counsel for the respondent-ED has further referred to Section 2(u) of the PMLA, which reads as under:

“proceeds of crime means any property derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a scheduled offence or the value of any such property or where such property is taken or held outside the country, then the property equivalent in value held within the country or abroad.”

It is next argued on behalf of the respondent-ED that under the provisions of Section 45 of the PMLA, no person accused of any offence

under the PMLA shall be released on bail or on his own bonds unless (i) the Public Prosecutor has been given an opportunity to oppose the application for such release and (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that accused is not guilty of such offence and that he is not likely to commit any offence while on bail. It is further submitted that limitation of granting bail as specified in sub-Section (i) is in addition to limitation provided under the Criminal Procedure Code.

Learned counsel for the respondent-ED has further argued that the petitioner does not qualify the triple test laid down under Section 45 as there is every possibility that he may flee from country if granted the concession of regular bail as he is a Dutch National and may also try to tamper with the evidence as the allegations are of siphoning of the money through Hawala and since the offence under PMLA is an international offence as he has brought the money from Netherlands and has used it in India by investing in Cabbana Resorts in Punjab.

It is also argued that co-accused of the petitioner, namely Mukesh Sharma, had filed anticipatory bail application in FIR No. 161 dated 17.06.2021, registered under Sections 467, 471, 120-B, 108-A of the IPC at Police Station City Phagwara, District Kapurthala on a complaint given by the Assistant Director, ED, wherein the allegations against the petitioner as well as said Mukesh Sharma were identical and were considered by this Court and the said application was dismissed by passing a detailed order, vide order dated 08.10.2021 passed in CRM-M-31053-2021.

It is further argued on behalf of the respondent-ED that the provisions of Section 45 of the PMLA were struck down by the Hon'ble Supreme Court on 23.09.2017, however, again amendment was made on 19.04.2018 and the question of its constitutional validity is pending before the Hon'ble Supreme Court as different High Courts are taking divergent views whether the provisions of Section 45 are revived/re-enacted or not.

Learned State counsel has filed the custody certificate, as per which, the petitioner is in judicial custody for the last three months and two days and it is admitted case of the parties that chargesheet has already been filed and investigation qua petitioner is complete.

After hearing learned counsel for the parties and in view of provisions of Section 45 of the Act, I find merit in the present petition, for the following reasons:

- (a) The primary objection raised by learned counsel for the respondent-ED is that the petitioner does not qualify the triple test laid down under Section 45 of the PMLA. The said three conditions laid down under Section 45 are that the public prosecutor should be given an opportunity of hearing, which has been given in the present case; secondly, if the public prosecutor opposes the application, a reasoned order be passed that the person is not guilty of offence and not likely to commit offence while on bail and thirdly that in addition to provisions PMLA, the provisions of Cr.P.C., regarding grant of bail, shall apply. Section 45 (1) (ii) is akin to Section 37 of the NDPS Act, wherein the Court, while granting bail,

has to form an opinion. In a case under the NDPS Act, it is easy for an accused who has been released on bail to repeat such offence, however, in a case under the PMLA like the present case, it is not easy for an accused to commit the offence again while on bail while staying in India.

(b) In view of the arguments raised by learned senior counsel for the petitioner that the entire proceedings were initiated on the basis of the mutual legal assistance sought by the Netherlands authorities in 2017 to apprise about the assets of the petitioner in India, for which later on the competent Court at Netherlands has already convicted the petitioner for a period of 44 weeks, vide judgment dated 22.09.2020 and, therefore, it will be a matter of trial whether the prosecution of the petitioner in India after his conviction in Netherlands would amount to double jeopardy.

(c) Not only this, there was no request on behalf of the Netherlands authorities to register a case under Section 44/45 or 65 of the PMLA as at the first instance, a mutual legal assistance was called in 2017 and it is not the case of the ED that by way of any further correspondence, it was communicated to corresponding authorities in Netherlands that the petitioner, who is a Dutch National, is being prosecuted in India, for which he has already been convicted by the Courts at

Netherlands.

(d) A perusal of order dated 17.07.2021, passed by the Special Judge, CBI, Punjab as well as reply filed by the ED nowhere reveals that when the petitioner has filed the aforesaid civil writ petition, which remain pending for a considerable long time, at any stage, it was conveyed to the writ Court that LOC has been issued against the petitioner and, therefore, the arrest of the petitioner on the basis of such LOC without communicating the grounds of arrest, shows that the petitioner was not informed about the LOC as even subsequent to that, show cause notices were issued to him and he attended the office of the ED for three occasions between 06.07.2021 to 09.07.2021.

(e) It is well settled principles of law that when the investigation is complete and charge sheet is filed in the Court, conclusion of trial is likely to take a long time, a person/accused like the present petitioner, who is aged about 63 years old, can be released on bail, subject to his furnishing bail/surety bonds and with a condition that his passport shall remain deposited with the Court/Prosecuting Agency and he will not leave the country without seeking prior permission of the Court.

Accordingly, it is held that the petitioner qualifies the test under Section 45 of the Act and therefore, the present petition is allowed.

The petitioner is ordered to be released on regular bail, subject to following conditions:

- (i) The petitioner will furnish bail and two sureties to the satisfaction of the trial Court/Illaqa Magistrate, out of which, one surety will be a local surety.
- (ii) The passport of the petitioner will remain in the custody of the prosecuting agency or the trial Court and the petitioner will not leave India without prior permission of this Court.
- (iii) The petitioner will furnish an undertaking that he will appear before the Investigating Agency as well as the trial Court as and when he is required and in case, he defaults in appearance, it will be open for the prosecution to apply for cancellation of his bail.

Disposed of.

27.10.2021
Wassem F. Noori

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No