

ABA of Mr. Kailash Agarwal, Director of NSEL's biggest Defaulter – ARK Imports, has been rejected by PHHC

Mr. Kailash Aggarwal is the Director of ARK Imports Pvt. Ltd., one of the largest defaulter in NSEL with an outstanding amount of Rs. 719.21 Crores due & payable to NSEL.

Earlier, Hon'ble MPID court had cancelled his bail on violating the bail conditions imposed upon him vide its order dated 2.12.2020. Mr. Kailash Aggarwal had disposed-off some of the EOW attached assets without the permission of the MPID Court and hence EOW filed a bail cancellation application against Mr. Kailash Aggarwal which got cancelled.

Further, being aggrieved by the order dated 02.12.2020, Mr. Kailash Aggarwal approached the Hon'ble High Court and filed a Criminal application no. APL/516/2020 dated 14.12.2020 for quashing & setting aside the order dated 02.12.2020 passed by the Hon'ble MPID court. The said application was allowed by the Hon'ble High Court vide order dated 17.12.2020 & sought interim protection. The matter is pending before the Hon'ble court.

Mr. Kailash Aggarwal had also applied for his Anticipatory Bail Application (ABA) in the court of Dr. Ajit Atri, Additional Sessions Judge, Ludhiana against the complaint filed by ED under the provisions of PMLA Act. The Hon'ble Court dismissed the ABA of Mr. Kailash Aggarwal vide its order dated 09.06.2021.

Simultaneously, The Enforcement Directorate (ED) had also moved a complaint against Mr. Kailash Aggarwal for fraudulently selling off the properties which were also attached by ED. The Directorate had attached various land parcels of ARK Imports Pvt. Ltd. under the provision of PMLA 2002 vide provisional attached order no. 11/2014 dated 28.07.2014.

Apprehending his arrest in the criminal case arising out of the above complaint/FIR bearing No.0093 dated 28.05.2021 registered at Police Station Dehlon, District Police Commissioner at Ludhiana, under Sections 420, 421, 465, 467, 468 & 471 IPC, Mr. Kailash Aggarwal preferred petition for seeking the relief of anticipatory bail before Hon'ble high court of Punjab and Haryana at Chandigarh

During the hearing, the Hon'ble High Court found the mis-conduct of Mr. Kailash Aggarwal & that he also failed to comply with the Hon'ble Bombay High Court Order, rejected the anticipatory bail vide order dated 07.12.2021 (attached below).

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

**CRM-M No.23525 of 2021(O&M)
Date of Decision: 07.12.2021.**

Kailash Aggarwal

...Petitioner

Versus

State of Punjab & Another

...Respondents

CORAM: HON'BLE MRS. JUSTICE MEENAKSHI I. MEHTA

Present: Mr. N.S.Shekhawat, Senior Advocate with
Mr. Aayush Arora, Advocate,
for the petitioner.

Ms. Samina Dhir, Deputy Advocate
General, Punjab, for respondent No.1-State.

Mr. S.P. Jain, Additional Solicitor General of India with
Mr. Alok Jain, Senior Panel Counsel UOI
for respondent No.2-Directorate of Enforcement.

Mr. Brijender Kaushik, Advocate, for
applicant-Rohit Gupta.

Mr. Amit Jhanji, Senior Advocate with
Mr. Vikas Kuthiala, Advocate &
Mr. Himmat Singh Sidhu, Advocate,
for applicant-NSEL.

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MEENAKSHI I. MEHTA, J.

Apprehending his arrest in the criminal case arising out of the
FIR bearing No.0093 dated 28.05.2021 registered at Police Station Dehlon,
District Police Commissionerate Ludhiana, under Sections 420, 421, 465,
467, 468 & 471 IPC, the petitioner has preferred this petition for seeking the

relief of anticipatory bail.

2. The genesis of the facts and circumstances, culminating in the registration of the subject FIR, lies in a criminal case registered at Police Station MRA Marg, Mumbai vide FIR No.216 dated 30.09.2013 under Sections 120-B, 409, 465, 467, 468, 471, 474, 477(A) IPC in respect of the economic offence, known as NSEL Scam, involving the amount of Rs.5600 crore. Since, the offences under Sections 120-B, 467 & 471 IPC are included in Part A of the Schedule appended to the Prevention of Money Laundering Act, 2002 (for short "the PMLA"), the said case was forwarded to respondent No.2-Directorate for investigation and on the basis thereof, respondent No.2 registered ECIR No.14/2013. Vide Order No.11 of 2014 (Annexure P-3) as passed therein on 28.07.2014, several land parcels were provisionally attached and the said order was, subsequently, confirmed by the Adjudicating Authority vide the order dated 08.12.2014 (Annexure P-4) while observing that the said properties had been acquired by the petitioner in the names of his Companies, by using the proceeds of crime, trailed to his Company M/s A.R.K. Import Pvt. Ltd, as obtained by defrauding the bona-fide investors while using the NSEL (National Stock Exchange Limited) as the platform for this purpose.

3. The present FIR has been registered at the instance of respondent No.2-Directorate, with the allegations that the petitioner has executed the sale deeds in respect of some of the properties attached vide the said orders Annexures P-3 and P-4 and he has siphoned-off the sale proceeds thereof with the help of Hawala/Market Operators whereas

respondent No.2-complainant was to take the possession of the said attached properties. It has also been mentioned in the vernacular version of this FIR (Annexure P-1) that during the enquiry, it transpired that the entries qua the said orders were not made in the relevant revenue record pertaining to the land situated in Village Ayali Khurd and though, the entry to this effect was made in the revenue record qua the land located in Village Jasad but it was deleted later-on and now, the same has again been recorded.

4. Respondent No.1-State has already filed its Written-Reply by way of the affidavit of Assistant Commissioner of Police (South) Ludhiana and respondent No.2-Directorate has also submitted its Reply, by way of the affidavit of Assistant Director, Directorate of Enforcement, Mumbai as well as the Additional Reply, by way of another affidavit of the same officer.

5. I have heard learned Senior counsel for the petitioner as well as learned State counsel for respondent No.1 and learned Additional Solicitor General of India with learned Senior Panel Counsel (UOI) for respondent No.2 in the present petition and have also perused the file thoroughly.

5. Learned Senior counsel for the petitioner has contended that the provisional attachment order Annexure P-3, as passed by respondent No.2-Directorate on 28.07.2014, had been confirmed by the Adjudicating Authority vide the order dated 08.12.2014 (Annexure P-4) and as per the provisions of Section 8(3) of the PMLA, the same (Annexure P-4) was to remain operative for a period not exceeding 365 days only whereas the sale deeds in question have been executed by the petitioner on 27.09.2019 and 22.11.2019, i.e after more than 4½ years and thus, it is explicit that the said

attachment order was not in force at the time of the execution of these sale deeds and therefore, the petitioner could not be fastened with any criminal liability for the same and thus, he has been falsely implicated in the present case. He has placed reliance upon the judgment handed down by the Division Bench of this Court in *Seema Garg Vs. Deputy Director, Directorate of Enforcement (Prevention of Money-Laundering Act) 2020(2) RCR (Criminal) 701*, in support of his contentions.

6. Per-contra, learned Additional Solicitor General of India and learned Senior Panel counsel (UOI) for respondent No.2-Directorate have pointed out that it has clearly been mentioned in the concluding para of order Annexure P-4 that the same would continue during the pendency of the proceedings relating to any offence under the PMLA before the Court and would become final after an order of confiscation is passed and they have argued that the proceedings are, presently, continuing/pending in the Special Court at Mumbai and hence, the above-said order is still in force.

7. I find force in the arguments of learned Additional Solicitor General of India and learned Senior Panel counsel (UOI) for respondent No.2 because Section 8(3) of PMLA provides as under:-

“(3) Where the Adjudicating Authority decides under sub-section (2) that any property is involved in money-laundering, he shall, by an order in writing, confirm the attachment of the property made under sub-section (1) of Section 5 or retention of property or record, seized or frozen under Section 17 or Section 18 and record a finding to that effect, whereupon such attachment or

retention or freezing of the seized or frozen property or record shall-

(a) continue during investigation for a period not exceeding three hundred and sixty-five days or the pendency of the proceedings relating to any offence under this Act before a court or under the corresponding law of any other country, before the competent court of criminal jurisdiction outside India, as the case may be; and....”

From the perusal of the above-quoted provisions, it becomes quite explicit that these provide two different spells for the validity of the order qua the confirmation of the attachment of any property, on the basis of the stage of the proceedings in respect of any offence under the PMLA by specifying that in case, the investigation is continuing in respect of the commission of any such offence, then, the said order shall remain operative for a period upto 365 days but if the proceedings are pending before the Court, then it shall continue during the pendency of the same.

8. It has categorically been deposed in Para 2 (II) of the Reply, as initially filed by respondent No.2, that the charge-sheet has already been presented against the petitioner in connection with the said criminal case, as registered by the Mumbai Police and the trial is pending before the Special Court under MPID Act. It being so, the time limit of 365 days, as envisaged under the above-said provisions for the validity of the order qua the confirmation of the attachment of the property, during the pendency of the investigation proceedings only, would not be applicable to order Annexure

P-4. To add to it, the orders Annexures P-3 & P-4 have already been challenged by the petitioner before the Appellate Tribunal by way of an appeal which is, concededly, still pending. This fact, itself, leads to an unequivocal inference to the effect that the afore-said orders are still in force because otherwise, there would not have been any occasion for the petitioner to continue to pursue the said appeal.

9. The observations, as made by the Division Bench of this Court in *Seema Garg (supra)* are of no help to the petitioner because in the afore-cited case, the investigation was still pending and the appellants were neither arrayed as the accused in the FIR nor in the complaint filed before the Special Court whereas in the present case, as discussed in the preceding paragraphs, the Charge-sheet has already been presented against the petitioner in the said criminal case registered by the Mumbai Police and the trial is pending before the competent Court at Mumbai.

10. Further, learned Senior counsel for the petitioner has contended that even if for the sake of arguments, respondent No.2-Directorate is presumed to be the owner of the properties under attachment, as allegedly sold by the petitioner vide the sale deeds in question, even then the sale of such properties by him to third persons does not constitute any offence under Sections 420 or 467, 465, 468, 471 IPC because the present FIR has not been got registered by the vendees of the said sale deeds who could have been aggrieved because of these sale transactions. To buttress his contentions, he has referred to the observations as made by Hon'ble Supreme Court in *Md. Ibrahim & Ors vs. State of Bihar & Anr. 2009(8)*.

SCC 751.

11. However, this contention is not tenable at this stage because while deciding the present petition as moved by the petitioner for seeking the relief of pre-arrest bail, this Court is not supposed to go to the extent of determining as to whether the offences, as alleged to have been committed in the case, are made out or not because the investigation is still at the nascent stage and the petitioner has yet to join the same.

12. To add to it, the subject FIR is an off-shoot of the economic offence pertaining to the scam involving the investments of the genuine/ bona-fide depositors to the tune of Rs.5600 crore approximately and a sum of Rs.720 crore, out of the same, has allegedly been swindled away by the petitioner through his Companies. It has specifically been observed by the Apex Court in **P.Chidambaram vs. Directorate of Enforcement Criminal Appeal No.1340 of 2019 (Arising out of SLP (Crl.) No.7523 of 2019) Decided on 05.09.2019** that *“the economic offences stand as a different class as they affect the economic fabric of the society and the merits of the contentions that Section 8 of the Prevention of Corruption Act, 1988 cannot be the predicate offence qua the appellant and whether it is attracted or not and as to whether the Enforcement Directorate had the threshold to acquire jurisdiction under the PMLA, cannot be considered at the stage when this Court is considering only the prayer for anticipatory bail”*. In view of these observations, it is explicit that the afore-said contention cannot be looked into and adjudicated upon while deciding the instant petition qua the prayer of the petitioner for grant of anticipatory bail.

13. The observations, as made by Hon'ble Supreme Court in *Md. Ibrahim & Ors (supra)*, are not of any avail to the petitioner because the same were made while deciding an appeal that had arisen out of the order passed by the High Court rejecting the prayer of the appellants to quash the order passed by the trial Court for the framing of the charges against them whereas in the present petition, as discussed earlier, the petitioner has sought the relief of pre-arrest bail.

14. Learned Senior counsel for the petitioner has also contended that the petitioner is aged about 73 years and is not keeping good health and even otherwise, his case is covered by the judgment rendered by the Apex Court in *Arnesh Kumar vs. State of Bihar & Anr. Criminal Appeal No.1277 of 2014 (Special Leave Petition (Crl.) No.9127 of 2013) Decided on 02.07.2014* and therefore, he deserves the relief as sought in this petition.

15. Again, it is worth-while to mention here that the observations as made in *Arnesh Kumar (supra)* do not come to the rescue of the petitioner to seek the afore-said relief because the directions given therein pertain only to the cases involving the offences punishable with imprisonment for a term which may be less than seven years or which may extend to seven years, whereas the offence under Section 467 IPC is also involved in the present FIR besides the other offences as detailed therein and the said offence is punishable upto imprisonment for life.

16. To cap it all, this Court deems it appropriate and necessary to precisely discuss the conduct of the petitioner as the same would also be

one of the key factors to adjudicate/ascertain his entitlement for the relief as prayed for in this petition. It has specifically been mentioned in Para 2 (VII) & (VIII) in the Reply, as initially filed by respondent No.2-Directorate, that the petitioner failed to comply with the order Annexure R-2/1 passed by Bombay High Court while granting him the relief of bail. He as well as his wife and another Director of the Company challenged the said attachment orders by way of filing several Writ Petitions even in this Court also and they were directed not to alienate/dispose of the attached properties and not to create any charge or encumbrance or third party rights over the same and their counsel also gave an undertaking to the same effect as reflected in order Annexure R-2/5 passed by the Division Bench of this Court on 11.04.2019 but inspite of the same, he went on to execute the sale deeds in question. These facts and circumstances speak volumes of the fact that the petitioner has been playing hide and seek even with the Courts and he cannot be allowed to continue with the same any more and to flout the orders passed by the competent Courts from time to time on several occasions. Moreover, it has also been specifically mentioned in Para 13 of the Reply filed on behalf of respondent No.1-State that the detailed investigation is required to be conducted to know about the officials of the Revenue Department and other persons who had helped the petitioner in disposing of the said properties and that the custodial interrogation of the petitioner would be required for the proper investigation of the present case.

17. As a sequel to the fore-going discussion, it follows that the petitioner does not deserve the relief of anticipatory bail and the petition in

hand, being *sans* any merit, deserves dismissal. Resultantly, the same stands dismissed accordingly.

18. However, it is clarified that nothing contained here-in-before shall be construed to be an expression of the opinion of this Court on the merits of the case.

CRM Nos.23269 & 18681 of 2021

19. These applications have been rendered infructuous in view of the final adjudication of the main petition and therefore, the same stand disposed of accordingly.

(MEENAKSHI I. MEHTA)
JUDGE

December 07, 2021.
seema

Whether speaking/reasoned?	Yes
Whether Reportable?	Yes

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