

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ASHOK MENON

WEDNESDAY, THE 28TH DAY OF OCTOBER 2020 / 6TH KARTHIKA, 1942

Bail Appl..No.6752 OF 2020

CRIME NO.ECIR/KCZO/31/2020 OF ENFORCEMENT DEPARTMENT

PETITIONER/ACCUSED:

M. SIVASANKAR
AGED 57 YEARS
S.O. N.D. MADHAVAN NAIR,
DEVARDARSANA,
KATTUR ROAD,
POOJAPURA, THIRUVANANTHAPURAM,
PIN - 695012.

BY ADVS.
SRI.S.RAJEEV
SRI.P.VIJAYA BHANU (SR.)
SRI.K.K.DHEERENDRAKRISHNAN
SRI.V.VINAY
SRI.M.REVIKRISHNAN
SRI.K.ANAND (A-1921)

RESPONDENT/S:

1 STATE
REPRESENTED BY STANDING COUNSEL,
HIGH COURT OF KERALA,
ERNAKULAM - 682031.

ADDL.R2 DIRECTORATE OF ENFORCEMENT
GOVERNMENT OF INDIA, REPRESENTED BY ITS ASSISTANT
DIRECTOR, COCHIN ZONAL OFFICE, KANOOS CASTLE, A.K.
SESHADRI ROAD, (MULLASSERY CANAL ROAD WEST)
REPRESENTED BY ITS STANDING COUNSEL, HIGH COURT OF
KERALA PIN 682031.

IS IMPEADED AS PER ORDER DATED 23/10/2020 IN CRL.M.A.
NO 1/2020

R2 BY ADV. ZOHEB HOSSAIN
R2 BY ADV. SHRI.P.VIJAYAKUMAR, ASG OF INDIA
R2 BY ADV. SRI.T.A.UNNIKRISHNAN
OTHER PRESENT : SRI.S.V.RAJU, ASG

THIS BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
23.10.2020, THE COURT ON 28.10.2020 PASSED THE FOLLOWING:

O R D E R

Dated this the 28th day of October 2020

This is an application filed for anticipatory bail under Section 438 Cr.P.C by the applicant who is apprehending arrest in Crime No. ECIR/KCZO/31/2020 of Enforcement Department.

2. The applicant is one of the senior most civil servants in the State of Kerala was, till recently working as Principle Secretary, Information Technology and was also Secretary to the Chief Minister of Kerala. He claims to have an unblemished service record of more than three decades. A Crime was registered by the Customs Commissioner ATC based on an allegation that the persons named Sarith, Swapna and Sundeep along with several other accused smuggled primary gold from abroad through diplomatic channel of UAE consulate. Consequently, other investigating agencies like the NIA, and the Enforcement Directorate also registered Crimes against the

aforesaid accused persons and the present Crime is being investigated. The applicant was summoned by the Directorate a number of times for questioning and the applicant has been cooperating with such questioning and investigation. The Customs as well as the NIA also had questioned the applicant several times. It is stated that he has been interrogated for more than 90 hours by all the three agencies together. Yet, none of the aforesaid investigating agencies could collect any incriminating materials against him even after hundred days of investigation. The Enforcement Directorate has filed a complaint before the Special Court in which certain baseless allegations are seen made against the applicant giving an indication that he too may have been involved in the illegal activities of the other accused. The applicant had, during his questioning by the agencies conceded about his acquaintance with Swapna who was working as Secretary to the UAE Consulate General. In his capacity as a person holding a key

position in the Government he had occasion to contact the Consulate General in connection with the several activities of the State. Swapna was working in the office of the Consulate and in connection with his official duties, the applicant was required to meet her for the purpose of discussing matters concerning the activities of the State. They had become family friends and used to exchange pleasantries and had attended family functions of each other. The applicant was not aware of the involvement of Swapna in gold smuggling activities with the other accused. The applicant had several Whatsapp communications with Swapna and also his Chartered Accountant. But there is nothing suspicious about the said communications. Swapna had allegedly received some money as tips from the ruler of Sharjah. On her request, the applicant had introduced a Chartered Accountant, known for his integrity with whom he had personal acquaintance for the last 25 years, to Swapna to help her to sort out and resolve her financial

dealings. The conversations between the applicant and the Chartered Accountant had taken place about 8 to 12 months prior to the alleged act of smuggling. The applicant is not aware of the details regarding the money transaction between Swapna and the aforesaid Chartered Accountant. The applicant apprehends that his communication with Swapna and the Chartered Accountant is being mis-represented to implicate him in a heinous crime of gold smuggling. Each time the applicant is questioned by these investigating agencies, it is taken up by the media to create sensational news to form a negative opinion about the applicant in the society. The applicant and his family consisting of his aged parents are being traumatised by such adverse and such false propaganda. The applicant has cooperated with the investigation throughout and has produced all those documents which he has been asked to produce. The applicant apprehends that the investigating agencies are under tremendous pressure due to

media trial. The false propaganda and the frivolous news items constantly demanding the arrest of the applicant may create a situation wherein the investigating agencies may succumb to the media pressure baying for the blood of the applicant. Despite having questioned the applicant for ceaseless hours, nothing has come out to implicate the applicant as an accused leading to an illegal arrest. The Enforcement Directorate had questioned the applicant for 30 hours out of the total 90 hours he was questioned by all the agencies together. It is also stated that considering the present pandemic situation specific directions were issued by the Hon'ble Supreme Court to arrest a person only if it is highly necessary. The applicant undertakes that he is willing to co-operate with the investigation. Considering the background of the applicant and his long unblemished service record, there is little possibility of his absconding or fleeing from justice. Custodial interrogation may not be required and the applicant is willing

to abide by any condition that may be imposed by this Court. Under the circumstances, the applicant seeks a pre-arrest bail in case he is to be arrested in connection with the aforesaid Crime of the Enforcement Department.

3. The Assistant Director, Directorate of Enforcement has filed a counter affidavit interalia contending as follows:-
Consequent to the seizure of 30 KGs of primary gold worth ₹14.80 crores camouflaged in the immune diplomatic baggage to the UAE Consulate as diplomatic cargo at the Thiruvananthapuram International Airport, OR No.07/2020 was registered by the Customs Commissionerate (Preventive), Cochin against Sarith, the former PRO at the UAE Consulate, Swapna Suresh, the former Secretary to the Consulate General of UAE, Sundeep Nayar and several others. The National Investigation Agency ('NIA' for short), Kochi registered a case as RC02/2020/NIA/KOC under Sections 16, 17 and 18 of the Unlawful Activities (Preventive) Act, 1967 against the aforesaid

persons. Based on the case registered by the NIA, the Enforcement Directorate ('ED', for short) also registered the aforesaid Crime and started investigation of the scheduled offences under the Prevention of Money Laundering Act 2002 ('PMLA', for short) against the aforesaid persons and some others. It is understood that huge sums of money were generated from the proceeds of crime and that they are possessing/concealing/using the said proceeds and the ED has been investigating and collecting evidences to initiate action under the provisions of the PMLA. The investigation so far has revealed that the persons arrayed as accused have committed offences of money laundering under Section 3 punishable under Section 4 of the PMLA. The NIA had conducted searches at the premises of the Swapna Suresh and seized her mobile phones and laptops. These devices have been handed over to the NIA Court and were sent to C-DAC, Thiruvananthapuram for analysis and mirror-image. ED had requested the NIA Court

for permission to obtain the mirror-image and consequently it was obtained from C-DAC on 08/10/2020. The ED is in the process of examining those digital devices. The apprehension of the applicant that he may be arrested is totally misplaced until there are reasons to believe that materials in the possession of the Directorate of Enforcement are sufficient to attract the provisions of Section 19 of the PMLA. The applicant is yet to be arrayed as an accused in the complaint filed by the ED. It is stated that there is absolutely no warrant in law to interfere with the statutory powers of arrest by the ED under the provisions of PMLA at this stage. Several materials have been found during the search by the NIA and the digital copies/mirror-images are being analysed by the ED. It would not be appropriate to disclose the entire facts which may hamper investigation in this case and help the applicant tamper with the evidence which has been collected. There is no basis for any reasonable apprehension of arrest made out by

the applicant. The ED had questioned the applicant and recorded his statements wherein he has affirmed that he had instructed his Chartered Accountant Sri Venugopal to help Swapna Suresh to manage her finances. Sri Venugopal has also confirmed that the applicant had approached him along with Swapna Suresh and had asked him to advise her financial matters. The applicant had also asked him to open a locker in the State Bank of India to be jointly operated by him with Swapna Suresh. Thereafter, Swapna Suresh approached him with a bag containing Rupees Thirty lakhs in cash. Initially, Sri.Venugopal was hesitant to accept that amount. But then Swapna Suresh explained that the cash had come from genuine sources and asked him to deposit that money in the locker. All this had happened in the presence of the applicant. The applicant was constantly in touch with Sri.Venugopal and he was informed about the withdrawals from the bank locker. It is contended that the applicant was evasive in his answers

pertaining to the bank locker and denied that he had given instructions to Sri.Venugopal to open a bank locker in his name jointly with Swapna Suresh. The WhatsApp messages recovered by the investigators would however prove otherwise. The search by NIA resulted in seizure of ₹ 64 lakhs from the said locker. Thereafter ₹ 36.50 lakhs was seized from another locker in the name of Swapna Suresh In the Federal Bank, Thiruvananthapuram. The applicant had during his questioning admitted that Swapna Suresh was not financially well off and that he had tried his best to help her to find a good job. The WhatsApp chats that he had with Swapna Suresh during the day indicates that they were very close and that she used to discuss everything with him. Under the circumstances, it would be hard to believe that he was not aware of Swapna Suresh receiving commission/kickbacks on smuggling of gold through diplomatic channel. The entire money that Swapna Suresh had amassed were "proceeds of crime" as defined under Section

2(1)(u) of PMLA. The materials in possession of the ED unearthed so far are being produced in a sealed cover before the Court which would demonstrate that the present application needs no indulgence for grant of anticipatory bail.

4. Heard the learned senior counsel Shri P.Vijayabhanu appearing for the applicant and Sri S.V. Raju, the ASG. Records perused.

5. The learned Senior Counsel Shri P.Vijayabhanu submits that the applicant is being unnecessarily harassed by the investigating agencies, including the ED. It is submitted that there are no materials whatsoever to implicate the applicant as an accused in this crime under the PMLA. Whatever materials collected by the ED indicates no involvement of the applicant. The fact that the applicant had introduced his Chartered Accountant to Swapna Suresh is not an offence. She wanted to deposit some money which she had received as tips from the consulate. The applicant had no

reason to doubt the veracity of her statement regarding how she had received money. Considering her relationship with the applicant, or that he had done was to introduce her to his Chartered Accountant. He denies having requested Sri.Venugopal to open a locker in the bank in his joint name with Swapna Suresh. He did not have anything to do with either the deposit or the withdrawals from the locker. Hence, he has every right to be released on pre-arrest bail as his apprehension of arrest is genuine. Though the applicant has not yet been made an accused in the crime, like the sword of Democles, the threat continues to hang over his head and it is submitted that it is not essential for a person to be arraigned as accused so as to seek pre-arrest bail. The mere apprehension that he may be made an accused would suffice, submits the learned Senior Counsel.

6. *Per contra* the learned ASG relies on the catena of decisions in support of his argument opposing the grant of

anticipatory bail to the applicant. In ***Vakamulla Chandrasekhar v. Enforcement Directorate & Ors [MANU/DE/3614/2017]*** the Division bench of the High Court of Delhi has held thus:

“45. We may now turn to the submission of the petitioner premised on Arnesh Kumar (supra). A perusal of Section 44(2) of the PMLA shows that the power of the High Court to deal with a regular bail application under Section 439 of Cr.P.C. has been preserved. However, there is no similar provision made in the PMLA with respect of the power of the High Court/Court of Sessions to grant anticipatory bail under Section 438 Cr.P.C. Thus, it, prima facie, appears to us that under the Scheme of the PMLA, the relief of statutory anticipatory bail is excluded. Such exclusion of the provision for grant of Anticipatory Bail is not violative of Article 21 of the Constitution of India (see Kartar Singh v. State of Punjab, MANU/SC/1597/1994 : (1994) 3 SCC 569). At the same time, a person may seek protective orders by invoking the writ jurisdiction of the concerned High Court. (see Hema Mishra v. State of Uttar Pradesh & Ors., MANU/SC/0032/2014 : (2014) 4 SCC 453”

Arguing that Economic offences are offences against the Nation and the society at large, the learned ASG relies on the decision of the Hon'ble Supreme Court in ***Y.S. Jagan Mohan Reddy v. CBI [2013 KHC 4402 :(2013) 7 SCC 439]*** wherein it is

held thus:

“15. Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The economic offence having deep rooted conspiracies and involving huge loss of public funds needs to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country.”

7. In *Rohit Tandon v. Directorate of Enforcement* [2017 KHC 6767 : (2018) 11 SCC 46] it is held thus :

“18. The consistent view taken by this Court is that economic offences having deep – rooted conspiracies and involving huge loss of public funds need to be viewed seriously and considered as grave offences affecting the economy of the country as a whole and thereby posing serious threat to the financial health of the country. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under S.24 of the Act of 2002.”

8. The learned ASG also relies on the decision of the Hon'ble Supreme Court in *P. Chidambaram v. Directorate of Enforcement* [2019 KHC 6886 SC : (2019) 9 SCC 24] wherein it

was held as thus:

“ 76. Economic Offences:

Power under S.438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain (1998 KHC 518 : 1998 (2) SCC 105 : 1998 (2) KLT SN 4 : 1998 SCC (Cri) 510 : AIR 1998 SC 631 : 1998 CriLJ 861), it was held that in economic offences, the accused is not entitled to anticipatory bail.”

9. After hearing the submissions made by the learned ASG and the learned Senior Counsel appearing for the applicant and on examining the provisions of the PMLA, I find that there is no specific provision in the aforesaid Act dealing with granting of anticipatory bail. The act of money laundering has both civil and criminal repercussions which the offender may have to face. Apart from adjudication, the perpetrator of the crime will also have to face penal consequences. The provisions would indicate that authorities for the purpose of the Act who can take action for violation of

the provisions in the Act are the Director, Additional Director, Deputy Director, Joint Director, Assistant Director and such other classes of officers as may be appointed for the purpose under Section 48 of the PMLA. The fact that very senior and experienced officers are empowered to act against the offenders of the PMLA itself would indicate the extent of caution and experience they have to deploy before implicating anyone as an accused or an offender.

10. In the instant case, the ED is relying on the statements given by the applicant as also Swapna Suresh and Sri.Venugopal, the Chartered Accountant. There is clear indication that the applicant was very close to Swapna Suresh, the prime accused in this crime. He had discussed regarding the deposit of amounts belonging to Swapna Suresh with his Chartered Accountant. He had introduced her to the Chartered Accountant and had asked him to sort out her financial problems. It is alleged to be in consequence of the directions

given by the applicant that Swapna Suresh and the Chartered Accountant (Venugopal) opened a locker in the State Bank of India, Thiruvananthapuram Branch. Both of them had rights to operate the locker. Even though the applicant has disassociated himself from the activities pertaining to the deposit of the amounts in the locker, there is some indication in the communications between the applicant and the Chartered Accountant regarding the applicant overseeing the management of the finances of Swapna Suresh. The Enforcement Directorate has not yet concluded whether the applicant is to be made an accused or a witness in the crime. However, there are strong indications pointed out by the ED to suggest that the applicant may be a person involved in the money laundering with Swapna Suresh. The statements given by the Chartered Accountant and the accused Swapna Suresh strongly indicate the involvement of the applicant. Probably there may not be sufficient evidence at present collected by

the ED to implicate the applicant as an accused, and there also may not be sufficient evidence to suggest that he is guilty of the offences alleged. But they have sufficient materials to interrogate him, for which he is bound to cooperate, as a Senior Government official. The applicant would state that he was connected with the affairs of the Government and had in such capacity interacted with Swapna Suresh, the Secretary to the Consulate General. If that be so, there is no need for him to interfere in matters concerning management of her finances. The fact that he had intervened in the management of the finances belonging to Swapna Suresh is a situation adverse to him. The first complaint that has been filed by the ED does not arraigned the applicant as an accused. Under the provisions of the PMLA, several complaints can be made as and when investigation progresses. Under the PMLA, the authorities under the Act are bound to carry out investigation by collecting evidence and for that purpose, they have been

sufficiently empowered to summon persons or require them to produce evidence, records, statements and also carry out searches of properties and persons, and even properties can also be seized or attached. But, the fact that very senior officers are alone empowered to proceed in arresting an offender indicates that they would do so only on having sufficient grounds to arrest the person. If that be so, the fact is that the applicant has not yet been made an accused and that he is only required for the purpose of interrogation by the officers of ED and it will have to be concluded that the prayer for anticipatory bail made by the applicant is premature. Even though the applicant is intended to be made an accused on sufficient materials being collected against him, considering the gravity of the offences under the PMLA, the applicant definitely may not be entitled to the extraordinary relief of pre-arrest bail, keeping in view the precedents referred to above. In view of the precedents stated above and the

discussions made, this Court is not inclined to restrain the applicant from being arrested and the prayer for pre-arrest bail is also premature. In case, the authorities under the PMLA invoke their powers to arrest the applicant under Section 19 of the Act, I am sure that they being very senior officers, would definitely comply with the provisions made thereunder. Hence, the application for anticipatory bail is only to be dismissed and I do so.

sd/-

ASHOK MENON

JUDGE

jg