

Raghubir Singh
Special Judge (PC Act) (CBI)-18,
Rouse Avenue District Courts,
New Delhi

IA No.16/23
CT Case No. 13/22
ECIR No: KLZO/41/2020
U/S : 3 & 4 of PMLA
Directorate of Enforcement v. Mohd. Enamul Haque

Order

1. This adjudication is on the application u/s 167 (2) Cr. P.C. filed on behalf of accused/applicant **Anubrata Mondal** wherein it is prayed that he be granted statutory bail in ECIR No. KLZO/41/2020 U/s 3 & 4 PMLA, 2002. The reply to this application is also there on record filed by the ED wherein it is agitated that the applicant can not be enlarged on statutory bail as the application in hand is without merits and deserves dismissal.

2. During the course of arguments, both the sides have placed reliance upon certain case laws and written submissions have also been filed on behalf of accused/applicant. The case laws so relied upon in support of the application are :

(i) *Nazir Ahmed v. The King Emperor, JC 1936.*

(ii) *Manoj v. State of MP, (1999) 3 SCC 715.*

3. The case laws relied upon by the ED in opposition to the statutory bail are as under:

(i) *State of West Bengal v. Dinesh Dalmia*, 2007 5 SCC 773.

(ii) *State v. K. N. Nehru*, MANU/TN/4205/2011.

(iii) *CBI v. Anupam J. Kulkarni*, MANU/SC/0335/1992.

(iv) *Anubrata Mondal @ Kesto v. CBI*.

(v) *Enforcement Directorate v. CBI*, C.R.R. No. 3880 of 2022.

(vi) *Sehegal Hossan v. ED, W. P. (Crl.) 2465/2022*.

The same have been gone through.

Facts of the case; in brief

4. The Directorate of Enforcement had initiated the present case proceedings pursuant to the Scheduled Offence lodged by the CBI there in the State of West Bengal vide FIR No. RC 0102020A0019 dated 21.09.2020. As per the said FIR, the then BSF Commandant Sh. Satish Kumar along with Mohd. Enamul Haque , Mohd. Enarul S. K., Mohd. Gulam Mustafa and other unknown public servants and unknown private persons were allegedly involved in illegal activities relating to smuggling of cattle and had generated/acquired proceeds of crime. The ED started investigating the case for the alleged money laundering of the proceeds of crime so generated and filed the main Complaint/Charge Sheet qua 6 persons shown arrayed as accused as on 18.04.2022. This Court through Ld. Predecessor took the cognizance thereof vide order dated 19.04.2022.

Thereafter two supplementary complaints/charge sheets have been filed against 7 (6+1) accused persons. The accused/applicant herein namely Sh. Anubrata Mondal is not included in those 13 accused persons so arrayed as such. However, he has been running into judicial custody in connection with the CBI case there at Asansol in West Bengal and during the judicial custody in CBI case, the ED moved an application u/s 50 of the Act of 2002 before the concerned Spl. Judge, CBI Court there at Asansol West Bengal and the same having been allowed, he was interrogated in Jail and was formally arrested by the ED in connection with the present case proceedings as on 17.11.2022. Thereafter, on the very next day i.e. 18.11.2022, an application seeking production warrant of accused/applicant Anubrata Mondal (u/s 267 Cr.P.C. r/w S65 PMLA) was moved before this Court. However, the said application had to be kept pending for a considerable period as per the request of one party or the other or at their joint requests as the accused/applicant had initiated some proceedings by way of Writ Petition before the High Court of Delhi, assailing the jurisdiction of this Court. However, vide order dated 19.12.2022, this Court directed the Jail Superintendent, Asansol Correctional Home, Asansol Paschimi Bardhman, West Bengal to produce the accused Anubrata Mondal before the Court of undersigned forthwith on receiving the copy of the said order. The order dated 19.12.2022 could be passed in the light of the order dated 15.12.2022 of the Hon'ble High Court of Delhi whereby it had been observed that *'issuance of notice in this petition will not come in the way of special court (i.e. this Court) to decide the application (i.e. application u/s 267 Cr.P.C.r/w S 65 PMLA) & all issues including jurisdiction'*. The factual

position as on the date is that the writ petition filed by the accused/applicant (CrI. 2790/2022) is pending before the Hon'ble High Court of Delhi and is shown listed as on 02.02.2023 as told on behalf of ED. The accused/applicant is in JC in CBI case at Asansol Correctional Home.

5. Now coming back to the application in hand, it is averred therein that the accused/applicant having been arrested by the ED as on 17.11.2022, was undeniably in detention since then without filing the Prosecution Complaint (qua this accused) till date despite lapse of the 60 days period as on the filing of the application in hand. On this ground, the statutory bail is sought relying upon the afore-referred Case Laws.

6. The fate of the application in hand can be ascertained by looking into the answers to the following core questions which are apparently involved herein:-

- a). Whether '*formal arrest*' can be equated with arrest?
- b). Whether formal arrest is inclusive of '*custody*'?
- c). What would be the starting point for *reckoning* the 60/90 days period for the purpose involved herein?

7. The concept of '*formal arrest*' was evolved by the Hon'ble Apex Court in **CBI Vs. Anupam J. Kulkarni** reported in MANU/SC/0335/1992. It has also been dwelt upon by the Hon'ble High Court of Madras in State Vs. K.N. Nehru (MANU TN/4205/2011) in the light of the afore-referred Apex Court decision and the gist thereof is to the effect that '*formal arrest*' can in

*no way be equated with the 'arrest'; much less for the purpose u/s 167 (2) Cr. P.C, as in case of 'formal arrest' the accused is already in custody in connection with some other offence and in such an eventuality, it was not practically possible even to produce the accused (so formally arrested) either before the Jurisdictional Magistrate or even before the nearest Magistrate within the stipulated period. It was to meet such like exigencies that the concept of 'formal arrest' was evolved by Hon'ble the Apex Court and as referred to/dwelt upon in State Vs. K.N. Nehru (Para 15). In this context, even the relied upon Case Law i.e Manoj Vs. State of MP 1999 3SCC 715 doesn't come to the rescue of the accused/applicant herein. In the said case, though the petitioner Manoj had been arrested in respect of two cases (one in Rajasthan and the other one in the State of M.P) and his arrest in connection with the later case was a 'formal arrest' while being in custody in connection with the earlier case in Rajasthan. The facts of the said case are entirely distinguishable in the present context in the sense that in that case the accused had already been admitted on bail in the main case (i.e. Rajasthan case) and despite that he could not be released from jail; he having been taken into formal custody in connection with the M.P. case. Thus, his liberty was actually & effectively curtailed amounting to the violation of his Fundamental Right under Article 22 (2) of our Constitution. However, in the given context, the accused/applicant is still running into JC in connection with the *Scheduled Offence/CBI Case* and he is not *behind bars (merely)* because of being formally arrested in connection with the ED case i.e. the present case.*

8. The Case Law cited as State of West Bengal Vs. Dinesh Dalmia 2007 5 SCC 773 further dents the cause of the accused/applicant, though in that case the factual position was slightly different when compared with the given case. In the said case, the accused, while in custody, in connection with a case there in Tamilnadu; on coming to know that another case was also there against him lodged in Calcutta West Bengal and that the Calcutta police were trying to seek his production, he made a '*notional surrender*' in the Calcutta case before the Ld. CMM/ACMM Chennai Tamilnadu. However, the question of statutory bail for the said accused in connection with the case in which he had made '*notional surrender*' reached upto the Apex Court wherein it was categorically held that the *sort of formal custody by way of notional surrender was not the actual physical custody* and that the reading of sub Sections 1 & 2 with proviso to Section 167 Cr. P.C clearly transpires that the incumbent should be in fact under the detention of police for investigation.

9. Further, in State Vs. K.N. Nehru, a clear distinction has been deciphered between '*arrest*' and '*custody*' and the question whether in every '*formal arrest*' there is custody, has also been elaborately dealt with. Even Manoj Vs. State of M.P has also been elaborately touched upon in the said judgment in its paras no.34 onwards. The crux of the said judgment has been summarized in para no. 42 thereof which is being reproduced/quoted hereunder:-

“Para 42. From the above discussions, the following conclusions emerge:

1). *When an accused is involved in more than one case and has been remanded to judicial custody in connection with one one case, there is no legal impulsion for the Investigating Officer in the other case to effect a formal arrest of the accused. He has got discretion either to arrest or not to arrest the accused in the latter case. The police officer shall not arrest the accused in a mechanical fashion. He can resort to arrest only if there are grounds and need to arrest.*

2). *If the Investigating Officer in the latter case decides to arrest the accused, he can go over to the prison where the accused is already in judicial remand in connection with some other case and effect a formal arrest as held in Anupam Kulkarni Case. When such a formal arrest is effected in prison, the accused does not come into the physical custody of the police at all, instead, he continues to be in judicial custody in connection with the other case. Therefore, there is no legal compulsion for the production of the accused before the Magistrate within 24 hours from the said formal arrest.*

(3). *For the production of the accused before the Court after such formal arrest, **the police officer shall make an application before the Jurisdictional Magistrate for issuance of P.T. Warrant without delay**. If conditions required in Section 267 of the Code of Criminal Procedure are satisfied, the Magistrate shall issue P.T. Warrant for the production of the accused on or before a specified date before the Magistrate. When the accused is so transmitted from prison and produced before the Jurisdictional Magistrate in pursuance of the P.T. Warrant, it will be lawful for the police officer to make a request to the learned Magistrate for authorising the detention of the accused either in police custody or in judicial custody.*

(4). *After considering the said request, the representation of the accused and after pursuing the case diary and other relevant materials, the learned Magistrate shall pass appropriate orders under section 167 (1) of the Code of the Criminal Procedure.*

(5) *If the police officer decides not to effect formal arrest, it will be lawful for him to straightway make*

an application to the Jurisdictional Magistrate for issuance of P.T.Warrant for transmitting the accused from prison before him for the purpose of remand. On such request, if the Magistrate finds that the requirements of Section 267 of the Code of Criminal Procedure are satisfied, he shall issue P.T. Warrant for the production of the accused on or before a specified date.

(6). When the accused is so transmitted and produce before the Magistrate in pursuance of the P.T. Warrant from prison, the police officer will be entitled to make a request to the Magistrate for authorising the detention of the accused either in police custody or on judicial custody. On such request, after following the procedure indicated above, the Magistrate shall pass appropriate orders either remanding the accused either to judicial custody or police custody under section 167 (1) of the Code of Criminal Procedure or dismissing the request after recording the reasons.

(7). Before the accused is transmitted and produced before the Court in pursuance of the P.T. Warrant in

connection with a latter case, if he has been ordered to be released in connection with the former case, the jail authority shall set him at liberty and return the P.T. Warrant to the Magistrate making necessary endorsement and if only the accused continues to be in judicial custody, in connection with the former case, he can be transmitted in pursuance of P.T. Warrant in connection with the latter case.”

10. When applied in the given context, it becomes clear that merely by formal arrest, the incumbent/accused/applicant cannot be construed having come in the physical custody of the ED so as to pursue the investigation and conclude the same within the stipulated period of 60 days reckoned from the date of formal arrest. It also becomes clear that the ED made the formal arrest on 17.11.2022 and promptly moved the application (u/s 267 Cr. P.C r/w Sec. 65 PMLA) seeking production warrants of the accused/applicant. This promptness is in clear consonance with the cited judgment State Vs. K.N. Nehru in its observations appearing in afore-quoted para 42 (3). Here it would not be out of context to mention that it is the accused/applicant himself on whose part the entire delay, if any, has taken place as it is he himself who has assailed the order of production warrants issued by this Court (and the proceedings thereof are pending before the Hon’ble High Court of Delhi). He cannot be allowed to take benefit of his own (mis)deeds. The observations made by Hon’ble Justice S. Nagamuthu in

State Vs. K.N. Nehru (Supra) in its para no.24 are also worth mentioning in this context and the same are being quoted hereunder:-

*“Para 24 - - - - - . But in the case where the accused is not actually arrested, as provided in section 46 of Cr. P.C, and only a formal arrest is effected, as rightly pointed out by the Ld. Public Prosecutor, we are of the opinion that the accused is not taken into physical custody of the police. In other words, when formal arrest is effected, as stated in CBI Vs. Anupam Kulkarni’s case, there is no custody, whereas, when there is actual arrest effected, there is custody. Thus, the law laid down in Deepak Mahajan’s case stating that in every arrest there is custody and not vice versa, cannot be imported to a formal arrest. **The law laid down by the Supreme Court is only with reference to the actual arrest and not with reference to the formal arrest”.***

11. As far as the question of reckoning the period of 60/90 days is concerned, it has been categorically elaborated upon and made crystal clear in CBI Vs. Anupam J.Kulkarni by Hon’ble the Apex Court by observing that ‘*a period of 90 days or 60 days has to be computed from the date of detention as per the orders of the Magistrate and not from the date of arrest (formal arrest in the present context) by the police*’.

12. The afore-made appreciation makes it clear that the Investigating Agency i.e. ED, after effecting the formal arrest as on 17.11.2022 promptly moved the requisite application u/s 267 Cr. P.C R/w Section 65 PMLA 2002, seeking production warrants against the accused/applicant and it is/was the accused/applicant himself who derailed the proceedings by assailing the order of production warrants issued by this Court and the time so consumed cannot be counted for; to the detriment of the Prosecuting Agency; for the purpose of the statutory bail. It is also worth mentioning that another co-accused namely Sehegal Hossain, who happens to be the police official, deputed in the security of the present accused, was similarly circumstanced and his order of production warrants issued by this Court was assailed uptill Hon'ble the Apex Court, but to no avail and despite knowing all those facts, the accused/applicant has again ventured into the same direction apparently to cause delay/to protract the proceedings. The application in hand is thus liable to be dismissed having no merits. Dismissed accordingly.

Announced in open Court
On 24th January 2023

(Raghubir Singh)
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