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

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Decided on: 13.10.2023

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CRL.M.C. 7488/2023 & CRL.M.A. 27920/2023

MR. GUANGWEN KUANG @ ANDREW Petitioner

Through: Mr. Abhishek Manu Singhvi and Mr. Siddharth Agarwal, Senior Advocates with Mr. Mudit Jain, Mr. Aashul Agarwal, Mr. Kunal Dewan, Mr. Aarohi Mikkilinani, Ms. Shradhanjali Parida, Mr. A. Singhvi, Mr. Vivek Kumar Singh, Mr. Vishwajeet, Ms. Rudrali, Ms. Mahima Malhotra and Mr. Ayush Goswami, Advocates

versus

DIRECTORATE OF ENFORCEMENT & ANR.Respondents

Through: Mr. Manish Jain, Special counsel for R-1/E.D.

CORAM:**HON'BLE MS. JUSTICE SWARANA KANTA SHARMA****JUDGMENT****SWARANA KANTA SHARMA, J.(ORAL)**

1. The instant petition under Section 482 of the Code of Criminal Procedure, 1973 ('Cr.P.C.') has been filed on behalf of petitioner seeking setting aside of impugned remand order dated 10.10.2023, passed by learned Additional Sessions Judge-05, Patiala House Court, New Delhi ('Sessions Court') in case titled 'Directorate of Enforcement vs. Nitin Garg & Ors.' in ECIR bearing no. ECIR/STF/02/2022 for



offence punishable under Section 3 & 4 of the Prevention of Money Laundering Act, 2002 (*PMLA*), and for directing the release of petitioner.

2. In the present case, an FIR bearing no. 807/2021 was registered on 05.12.2021 at Police Station Kalkaji, New Delhi under Sections 417/420/120B of Indian Penal Code, 1860 (*IPC*) and another FIR bearing no. 190/2021 was registered under Sections 417/420/468/471/120B of IPC, against one M/s. Grand Prospect International Communication Pvt. Ltd. (*GPICPL*) on the basis of a complaint lodged by the Ministry of Corporate Affairs (*MCA*).

3. In brief, the allegations in the said FIR are that certain Chinese shareholders of GPICPL had used forged identification documents and falsified addresses, while projecting itself to be a subsidiary company of Vivo, China. It is alleged that the company GPICPL had been incorporated by Zhengshen Ou and Zhang Jie, both Chinese nationals, with the help of one Chartered Accountant namely Nitin Garg who had facilitated the incorporation of the company by witnessing their signatures and their documents. During enquiry conducted by MCA, it was found that the said company had been incorporated to conduct fraudulent businesses. It is also alleged that the certifying professionals who had certified and filed e-forms knew that the same contained false information and false documents about the directors namely Zhengshen Ou and Zhang Jie. During inquiry, it was found that Zhengshen Ou and Zhang Jie were the shareholders of company, Zhengshen Ou and Bin Luo were directors of the company at the time of incorporation, Vivek Kumar is an ex director of company, Zhengshen Ou, Zhang Jie and



Hong Cheng Yu are the present directors of company and the Director Identification Number ('DIN') of all the three present directors have been deactivated due to non-filing of KYC form with MCA. It is alleged that Director and shareholder Zhang Jie had used a false driving license for applying DIN, for giving his address at Shillong, Meghalaya and further that he had again used the false driving license for opening bank account with HDFC Bank. It is also alleged that the said company is not reported to be subsidiary of Vivo in official records, whereas the company publicly projects itself to be a subsidiary of Vivo. Since the offences under sections 120B/417/420/471 of IPC are scheduled offences under Part A of PMLA, a prima facie case for commission of offence of money laundering under Section 3 of PMLA, punishable under Section 4 of PMLA, was alleged to have been made out against the accused persons and an ECIR i.e. ECIR/STF/02/2022 dated 03.02.2022 was recorded and the case was taken up for investigation under the provisions of PMLA.

4. The present petitioner was arrested by the respondent i.e. Directorate of Enforcement on 10.10.2023 and produced before the learned Sessions Court and the Directorate of Enforcement had sought 10 days custody of the petitioner alongwith other arrested individuals. Vide impugned order dated 10.10.2023, the learned Sessions Court had remanded the present petitioner to custody of Directorate of Enforcement for a period of three days i.e. till 13.10.2023.

5. Aggrieved by the aforesaid order, the present petition has been filed seeking setting aside of the remand order and consequently, the immediate release of the petitioner.



6. The case of the petitioner is that he was not arrayed as an accused in the FIR lodged at the instance of MCA, nor were there any allegations against him. It is also his case that though the search and seizure under Section 17 of PMLA had been carried out at more than 30 locations across India, no search whatsoever was ever conducted on any premises of the petitioner. It is also his case that he had been called to join investigation in September, 2022, wherein he had duly appeared before the investigating agency and joined investigation. Thereafter, he was called to join investigation only on 09.10.2023 when he had duly appeared before the agency, however, he was interrogated only for half an hour by asking routine questions, and he was arrested immediately. It is stated that he was arrested on 09.10.2023 itself whereas his arrest memo was prepared showing his arrest at 2:40 AM on 10.10.2023.

7. Learned Senior Counsel for the petitioner argues that the arrest of the petitioner has been carried out in a malafide manner and against the mandate of Section 19 of PMLA and such arrest is illegal and in violation of rights and protections available to the petitioner under law. It is stated that as per Section 19, it is necessary that the investigating officer should have a belief that the person being so arrested has been guilty of an offence punishable under this Act, and it is argued by learned Senior Counsel that the said ingredient of Section 19 is missing in the present case since the investigating officer has not recorded any such satisfaction. It is also argued that the mandatory nature of compliance of the provisions of Section 19 is affirmed from the Explanation to Section 45(2) of PMLA which says that the officers under PMLA are empowered to arrest an accused without warrant,



subject to the fulfillment of conditions under Section 19 of PMLA and other conditions listed under Section 45 of PMLA. It is also argued that as held by the Hon'ble Apex Court recently in case of ***Pankaj Bansal v. Union of India*** 2023 SCC OnLine SC 1244, mere non-cooperation by a witness is not enough to render the said person liable to be arrested under Section 19 of PMLA. It is also argued by learned Senior Counsel that grounds of arrest such as giving of 'evasive replies' or 'non-cooperating' cannot ipso facto lead to arrest of an individual as he cannot be asked to give an admission of guilt. It is also argued that from a bare perusal of the entire grounds of arrest, it is not even made out that any offence with respect to money laundering has been committed by the petitioner herein. It is also argued that there is no direct nexus between the criminal activity allegedly committed by the petitioner and the property acquired therefrom, and also that the proceeds of crime in the instant case, which have been calculated to the tune of Rs.1603 crore are all deemed and presumed figures in nature. It is also argued that in view of the decisions of Hon'ble Apex Court in ***Pankaj Bansal (supra)*** and ***V. Senthil Balaji v. The State represented by Deputy Director Criminal Appeal Nos. 2284-2285 of 2023 decided on 07.08.2023***, the grant of 03 days custody to Directorate of Enforcement by the learned Sessions Court is against the requirements and safeguards provided under Section 167 of Cr.P.C. It is also stated that as observed in case of ***V. Senthil Balaji (supra)***, for a person to be arrested, it is important that investigating officer should believe that a person is 'guilty' and 'needs to be arrested'. Therefore, it is argued that present petition be allowed and the order dated 10.10.2023 passed by



learned Sessions Court be set aside and the petitioner be immediately released from the custody of respondent/Directorate of Enforcement.

8. Learned Special Counsel for the respondent/Directorate of Enforcement vehemently opposes the issuance of notice in the present petition and prays that the same needs to be dismissed at the threshold. It is argued that the learned Sessions Court in the remand order impugned before this Court had specifically inquired from each accused as to whether they had been supplied written grounds of arrest and the answer received was affirmative. It is also argued that the learned Sessions Court had categorically recorded a finding that there was no prima facie violation of Section 19 of PMLA and that the investigating officer had reason to believe that the petitioner and other accused persons were guilty of commission of offence under PMLA. It is also argued that the present petition is an abuse of process of law and that the petitioner has neither challenged the ground of arrest nor challenged the arrest order or arrest memo, rather has only challenged the consequential proceeding post arrest i.e. the remand order. It is stated that the judgment in case of *Pankaj Bansal (supra)* relates to setting aside of arrest orders and memos and the consequential proceedings arising therefrom vide which the accused therein had been remanded to the custody of Directorate of Enforcement. It is therefore argued that there are no grounds warranting any interference with the impugned order dated 10.10.2023.

9. This Court has heard arguments addressed by the learned Senior Counsel for the petitioner as well as learned Special counsel for the respondent, and has perused the material placed on record.



10. The concluding portion of the impugned order dated 10.10.2023 reads as under:

“16. Considering the facts and circumstances of the case and that to unearth the complete conspiracy, I am of the considered opinion that the custody remand of the accused persons Hari Om Rai, Nitin Garg, Rajan Malik and Guangwen Kuang @ Andrew is necessary. Accused persons namely Hari Om Rai, Nitin Garg, Rajan Malik and Guangwen Kuang @ Andrew are accordingly remanded to ED custody till 13.10.2023(three days). However, it is directed that his interrogation shall be conducted at some place having CCTV coverage in accordance with the guidelines laid down by the Hon'ble Supreme Court in case of Paramvir Singh Saini Vs. Baljit Singh & Ors., SLP CrI. No. 3543/2020 decided on 02.12.2020 and also in accordance with all the other applicable rules, directions and guidelines on the subject and the said CCTV footage shall be preserved. Accused persons shall be medically examined once in every 48 hours during the above period and in terms of provisions contained in Section AID Cr.P.C., the accu persons shall also be permitted to meet their Advocates for half an hour daily between 6pm to 7pm during the said period of their ED custody in a manner that the ED officials are not able to hear their conversations.”

11. As per investigation conducted by the Directorate of Enforcement, the alleged company i.e. GPICPL was engaged in the business of distribution and providing aftersales services of Vivo mobile phones and accessories in the State of Himachal Pradesh, Jammu and Kashmir and Leh and Ladakh. It is alleged that since the incorporation of the company in the year 2014 till December, 2021, it had received total credits of approximately Rs.1487 crore in its bank account through its business activities and out of this amount, approximately Rs.1200 crore had been transferred to the accounts of Vivo Mobiles India Pvt. Ltd. It was also found during investigation that soon after the incorporation of Vivo India in the year 2014, 19 more companies, including the company in question i.e. GPICPL, had been



incorporated across India having Chinese nationals as their Directors and shareholders and these companies had been used to control the complete supply chain of Vivo mobiles in India. It was also discovered that these companies and their officials used to communicate through various Chinese applications and despite them operating in India, their data was not maintained in India, rather maintained in the servers in China. Further, investigation was also conducted on the aspects of commission of scheduled offences by Vivo India and its state distributor companies by way of using forged and fabricated driving licenses on the basis of which the directors had obtained the DIN and had opened accounts with HDFC Bank.

12. Investigation was also conducted to unearth the criminal conspiracy qua the real ownership of the companies and it was found that Coinmen Consultants LLP had carried out incorporation work for 18 entities of Vivo Group apart from the main company, including GPICPL, and all these companies were centrally controlled from China by 'Vivo Mobile Communication Company Limited, China' through its employees namely Andrew Kuang i.e. the petitioner, Ray Xu, Ye Liao, etc. and all these employees had been sent by Vivo, China to incorporate Vivo, India and state distributor companies without disclosing true and correct information before the government authorities. It was also discovered that to give effect to this, invitation letters to the employees of Vivo, China had been given by M/s. Lava International, a company owned by Hari Om Rai, in the years 2013-2015. It was found that the present petitioner Andrew Kuang, who was an employee of Vivo China, was communicating with the concerned



persons including Coinmen Consultants LLP for the purpose of incorporation of Vivo group companies. It was also found that the Foreign Currency Gross Professional Returns of majority of the companies was being done through a common email-id belonging to the present petitioner Andrew Kuang. Further, there are allegations of violation of FDI Policy against the said companies.

13. Thus, from the perusal of records including the remand application filed before the learned Sessions Court, the role of present petitioner Andrew Kuang can be summarised as under:

- a. He is an office bearer of Vivo Mobile India Private Limited and was formerly with mobile communication China
- b. He had played a pivotal role in incorporation of entire setup of Vivo group companies in India
- c. He had regularly coordinated with Draphant Consultant Pvt. Ltd. and Nitin Garg's Coinmen Consultants LLP for the purpose of incorporation of Vivo Mobile India Limited and 18 other state distributor companies including GPICPL.
- d. The petitioner had not co-operated during the investigation, and had shown his inability to provide the information sought by the Directorate of Enforcement. He had also failed to submit information as to how he had come to India, the salary he had received during his stay, etc. He had also given evasive replies regarding queries related to incorporation of the companies with intent to mislead the investigation and conceal the true nature of the entire structure of Vivo India and other state distributor companies.



- e. On the basis of investigation, it had come to light that he was *prima facie* one of the main conspirators who, in collusion with other Chinese individuals and entities, had helped in creating a mesh of companies all over the country with a strategic move to have their presence over the country in the garb of business enterprises.
 - f. He had monitored and supervised the whole process and communicated with the concerned entities regarding any difficulty or statutory issues faced by any of the state distributor companies for the purpose of incorporation.
 - g. 17 out of 20 companies had provided the email-id of the present petitioner in the FC-GPR filings before RBI which proves that he was well-aware about the mesh of companies being incorporated throughout the country.
 - h. He was a part of larger criminal conspiracy and was therefore *prima facie* connected with the proceeds of crime acquired by Vivo Mobile India Private Limited and its state distributor companies through commission of various schedule offences.
14. This Court has also examined the contents of the grounds of arrest supplied to the petitioner herein at the time of his arrest which also contains the details of the investigation conducted under PMLA in respect of the FIR as well as the role of the present petitioner. It is significant to note that under the heading ‘Role of Andrew Kuang’, investigating officer had given details of as to how the present petitioner was one of the main conspirators who, in collusion with other Chinese individuals, had helped in creating a web of companies



all over the country; as to how he had monitored and supervised the whole process and communicated with other entities; as to how his email-id was used in FC-GPR filings before RBI and that being an active part of conspiracy, the petitioner was connected with the proceeds of crime i.e. the proceeds that such companies had received through commission of scheduled offences and which had been siphoned off outside India through central entity i.e. Vivo Mobile India Private limited. Ultimately, the investigating officer had concluded that the present petitioner was the prime conspirator of formation of these companies through which acquisition of proceeds of crime had taken place and which, after layering and integration, had been siphoned off by Vivo India. It was also mentioned by the investigating officer that the present petitioner is involved in the offence of money laundering.

15. Moreover, para 6 of the remand application specifically mentions that on the basis of investigation carried out so far and materials collected, the present petitioner was 'guilty' of offence of money laundering under PMLA and therefore he was arrested on 10.10.2023 and written grounds of arrest were also given to him. It is also mentioned in the remand application that custodial interrogation of prisoner is absolutely necessary for the purpose of unearthing the conspiracy since the material collected so far indicates a strong case regarding involvement of present petitioner in the offence of money laundering. The arrest order dated 10.10.2023 also mentions that the arresting officer had a reason to believe that the petitioner was 'guilty' of an offence punishable under provisions of PMLA, which is in the format which has been reiterated and directed to be followed by all the



authorised officers under PMLA throughout the country in the recent decision of Hon'ble Apex Court in case of ***Pankaj Bansal*** (*supra*).

16. This Court notes that by way of present petition, the petitioner has only challenged the impugned order dated 10.10.2023 passed by learned Sessions Court *vide* which the petitioner, along with other accused persons, was remanded to the custody of Directorate of Enforcement for a period of 03 days, primarily on the ground that the same fails to follow the ratio laid down in case of ***Pankaj Bansal*** (*supra*).

17. Accordingly, this Court has carefully considered the decision of Hon'ble Apex Court in case of ***Pankaj Bansal*** (*supra*) and has perused the remand order impugned before this Court. This Court is of the opinion that the impugned order takes note of the allegations leveled against the accused persons in the FIR as well as the investigation conducted so far by Directorate of Enforcement. The learned Sessions Court had also perused the written grounds of arrest placed on record and had also taken note of the fact that the grounds of arrest in writing had been supplied to the accused persons in compliance of judgment of the Hon'ble Apex Court in case of ***Pankaj Bansal*** (*supra*). After perusing the records of the case, the learned Sessions Court has categorically recorded that *prima facie* there was no violation of Section 19 of PMLA since the investigating officer, from the material and investigation conducted so far, had formed an opinion that the accused persons were guilty of offence of money laundering and had affected their arrest accordingly.

18. The impugned order also mentions that the custody of the



accused persons was sought not only due to their non-cooperation and evasive replies, but also due to the deliberate attempts to evade/mislead investigation and to find out the deep rooted conspiracy for the commission of offence under PMLA. Only after considering the abovementioned facts, the remand order impugned before this Court was passed. Therefore, the contention that the learned Sessions Judge failed to apply its mind to note that the ratio of case of Pankaj Bansal was not followed is without merit. The order reveals that the contentions regarding non-supply of grounds of arrest as well as evasive replies were clearly dealt with by mentioning it in the order and thereafter passing the remand order after considering the same.

19. This Court notes that the present remand order is clearly distinguishable from the remand order which was challenged before the Hon'ble Apex Court in case of *Pankaj Bansal (supra)* in which the concerned Sessions Judge had failed to even record a finding that he had perused the grounds of arrest to ascertain as to whether Directorate of Enforcement had recorded reasons to believe that the accused persons therein were guilty of an offence under PMLA and the order had merely recorded that the custodial interrogation of the accused was required in view of the seriousness of the offences and the stage of investigation.

20. Having also considered the judgment of Hon'ble Apex Court in case of *V. Senthil Balaji (supra)*, this Court notes that the investigating agency i.e. Directorate of Enforcement had satisfied the learned Sessions Court with adequate material for the need of custody of the accused and the learned Sessions Court had arrived at a



conclusion that Section 19 of the Act was duly complied with and it is only thereafter that the accused persons including petitioner had been remanded to the custody of Directorate of Enforcement.

21. As regards the contention that there should be a nexus between the criminal activity and the property acquired therefrom, it is to be noted at the cost of repetition that the grounds of arrest and the remand application clearly mention the involvement of present petitioner from the very initial stage i.e. incorporation of the companies in question throughout the country which had ultimately resulted in acquiring proceeds of crime and siphoning off the same.

22. In these circumstances, this Court does not find any infirmity in the order of remand dated 10.10.2023 challenged before this Court as the same takes into account the mandate of compliance of provisions of Section 19 of PMLA as well as Section 45 of PMLA. It is also clear from the order and the remand application itself that the reasons and grounds for arrest of the present petitioner are not merely confined to their non-cooperation and evasive replies, but also record the grounds as discussed in the preceding paragraphs of this order.

23. Accordingly, the present petition stands dismissed alongwith pending application.

24. It is also clarified that nothing expressed hereinabove shall tantamount to expression of opinion on the merits of the case.

25. The judgment be uploaded on the website forthwith.

SWARANA KANTA SHARMA, J

OCTOBER 13, 2023/ns