2019 INSC 1019

NON-REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1381 OF 2019
(@ S.L.P. (CRL.) NO. 7437 OF 2019

Serious Fraud Investigation Office ...Appellant(s)

Versus

Nittin Johari & Anr. ...Respondent(s)

J U D G M E N T

MOHAN M. SHANTANAGOUDAR, J.

Leave granted.

2. The instant appeal challenges the grant of bail to Respondent No. 1 by the High Court of Delhi in Bail Application No. 1971/2019 in C.C. No. 770/2019, vide the order dated 14.08.2019.

3. The case of the prosecution primarily hinges on the commission of fraud punishable under Section 447 of the Companies Act, 2013 (for short "the Companies Act"), though several other offences under the Companies Act and the Indian

Penal Code, 1860 have also been alleged. Briefly put, it is alleged that from FY 2009-10 to FY 2016-17, Brij Bhushan Singal and Neeraj Singal, promoters of Bhushan Steel Ltd. (for short "BSL"), assisted by employees and close associates, used a complex web of 157 companies to siphon off funds from BSL for various purposes, and also fraudulently availed of credit from various lender banks and manipulated the books of accounts and financial statements of BSL, causing wrongful loss to banks and financial institutions amounting to Rs. 20,879 crores and causing wrongful gain to the promoters and their family members, amounting to around Rs. 3500 crores.

Respondent No. 1 herein, Nittin Johari, who was the Chief Financial Officer and Whole Time Director (Finance) of BSL, as well as a member of the Committee of the Board of Directors on Borrowing, Investment and Loans during the relevant period, was alleged to have been a close associate of the promoters and to have played a central role in perpetrating these frauds. In particular, it is alleged that Respondent No. 1 played an active role in using fraudulent letters of credit to avail of credit from lender banks, in inflating Stock-in-Transit figures to avail of greater Drawing Power from banks, and in manipulating

statements of accounts and other financial statements of BSL in the garb of adopting the Indian Accounting Standards.

Investigation into the affairs of BSL and certain associated companies had been initiated by the Serious Fraud Investigation Office (for short "the SFIO"), the Appellant herein, pursuant to the order dated 03.05.2016 issued by the Ministry of Corporate Affairs (for short "the MCA") under Section 212(1)(c) of the Companies Act. Gradually, the scope of investigation expanded to 157 companies and 130 individuals.

4. Respondent No. 1 came to be arrested on 02.05.2019, and was remanded to the Appellant's custody on 03.05.2019. He has been in judicial custody since 08.05.2019. It is also pertinent to note that previously, co-accused Neeraj Singal had been granted certain interim reliefs (including interim bail) by the High Court of Delhi vide order dated 29.08.2018 in W.P. (Crl.) No. 2453/2018, in which he had challenged the constitutionality of Section 212(6)(ii), (7) and (8) of the Companies Act. The operation and effect of this order (save for his interim release) had been stayed by this Court in appeal, vide order dated 04.09.2018.

5. Respondent No. 1 applied for regular bail under Section 439 of the Code of Criminal Procedure, 1973 (for short "the Cr.P.C."),

which was dismissed by the Special Judge (Companies Act), Dwarka District Courts, Delhi, vide order dated 06.06.2019. The Investigation Report was submitted by the Appellant to the MCA on 27.06.2019, and after obtaining sanction from the MCA, the Petitioner filed the Complaint before the Special Court on 01.07.2019. It may be pertinent to note that as per Section 212(15) of the Companies Act, the Investigation Report filed under Section 212(12) of the Companies Act is deemed to be a report filed by a police officer under Section 173 of the Cr.P.C. (i.e. the chargesheet).

Respondent No. 1 filed another application under Section 439 of the Cr.P.C. before the Special Judge, which was dismissed vide order dated 02.08.2019. It is pertinent to note that both these orders take note of the mandatory nature of Section 212(6)(ii) of the Companies Act pertaining to the grant of bail for offences, as well as of the gravity of the economic offence committed, the deep-rooted nature of the conspiracy, and the huge loss of public funds involved.

6. Bail Application No. 1791/2019 was subsequently filed before the High Court of Delhi, which came to be allowed vide the impugned order, giving rise to the instant appeal. The impugned

order was stayed by this Court on 16.08.2019. Respondent No. 1 therefore continues to be in custody.

7. At the outset, learned Solicitor General Shri Tushar Mehta, appearing on behalf of the Appellant, requested that as the proceedings in ***SFIO* v. *Neeraj Singal*** (Crl. Appeal No. 1114 of 2018) might be referred to by Respondent No. 1 to buttress his claim for bail on the ground of parity, it may be appropriate for this bench to also take up the proceedings related to the grant of interim bail to Neeraj Singal, currently pending before a coordinate bench of this Court, alongside the present petition. As of now, we do not find any ground to accept this request, and are therefore constrained to turn it down for the present.

Learned Solicitor General also submitted that the relief of interim bail had been wrongly granted to co-accused Neeraj Singal by the High Court of Delhi when he mounted a challenge to the constitutionality of Section 212(6)(ii), (7) and (8) of the Companies Act, and not on merits. This order had thereafter been criticized by this Court in Criminal Appeal No. 1114 of 2018 in its order dated 04.09.2018, inter alia on the ground that the High Court should have at least considered the case for interim relief by applying the broad contours of Section 439 of the Cr.P.C.

In this respect, he referred to the following observations made in the order dated 04.09.2018:

> "9. In the nature of the interim order that we propose to pass, we refrain from elaborating on the contentions and the reasons recorded by the High Court at this stage. However, we may observe that prima facie we find that the reasons being on the constitutional validity of provisions apart from Sections 212(6)(ii) and 212(7) of the Act ought not to have weighed with the High Court for grant of interim relief. Moreover, in any case, the High Court ought to have applied the broad contours required to be kept in mind for grant of bail under Section 439 Cr.P.C., which aspect, we find, has not been adverted to at all in the impugned order. There is prima facie substance in the grievance of the appellants that the High Court has failed to consider matter such as the nature of gravity of the alleged offence. Moreover, we find that in the course of the impugned order, the High Court even proceeded to recall certain observations made by it in another case (***Poonam Malik v. Union of India*** [W.P.(Crl.) No.2384 of 2018] order dated 10th August 2018)."

It was submitted that in light of these peculiar circumstances, there exists no reason to grant bail to Respondent No. 1 on the ground of parity with Neeraj Singal. It was further submitted that the non-arrest of various other co-accused was not pertinent to deciding whether Respondent No. 1 should be released on bail.

Learned Solicitor General also sought to impress upon us the magnitude of the offence, arguing that economic offences

form a class apart, particularly cases such as the instant one, which have resulted in not only a substantial loss to banks but also a huge blow to the national economy. In such cases, the Court must account for several factors while granting bail, especially the gravity of the offence involved. In pursuance of this contention, he referred to certain observations made by this Court in ***Y.S. Jagan Mohan Reddy* v. *Central Bureau of Investigation***, (2013) 7 SCC 439 to this effect. It was argued that the above factors had not been considered adequately by the High Court in the impugned order, which granted bail merely on the basis of "broad probabilities" and without adverting to the gravity of the offence and its impact on society.

In this respect, he took us through the contents of the complaint, arguing that the High Court had erred in selectively referring to certain portions thereof, and had not appreciated that the extent of the role of Respondent No. 1 in the alleged offences had been made out extensively throughout the complaint.

Additionally, reference was made to the mandatory conditions under Section 212(6)(ii) of the Companies Act, which require the Court to record its satisfaction that there exist reasonable grounds for believing that the accused is not guilty of

the alleged offence and is not likely to commit any offence while on bail. It was argued that these conditions do not imply that an applicant would be kept in custody indefinitely. In this respect, our attention was drawn to the decision in ***Collector of Customs, New Delhi v. Ahmadalieva Nodira***, (2004) 3 SCC 549, pertaining to an analogous provision (i.e. Section 37(1)(b)(ii) of the Narcotic Drugs and Psychotropic Substances Act, 1985), in which it was held that the term "reasonable grounds" refers to something more than prima facie grounds, and contemplates substantial probable causes for believing that the accused is not guilty of the offence concerned.

Learned Solicitor General also referred to ***Nikesh Tarachand Shah* v. *Union of India***, (2018) 11 SCC 1, wherein this Court had struck down Section 45 of the Prevention of Money Laundering Act, 2002 (for short "the PMLA"), another provision analogous to Section 212(6) of the Companies Act. It was contended that this decision was irrelevant to the present case, since the classification because of which the provision was held to be unconstitutional had been done away with. This was because when the said judgment was passed, Section 45 of the

PMLA imposed the twin conditions for bail only for offences found in Schedule A of the PMLA (i.e., 'predicate offences' found in other penal statutes) which were punishable with imprisonment for three years or more, and this Court had struck down this provision as unconstitutional mainly on the ground that the aforesaid classification did not seem to have a rational nexus to the object of that legislation. However, the Parliament had subsequently amended Section 45 of the PMLA, imposing the twin conditions for bail for offences under the PMLA itself, and not for offences found in Schedule A. It was further submitted that after the said amendment, Section 45 of the PMLA had become *in pari materia* with Section 212(6) of the Companies Act, as the latter section also imposed the twin conditions for offences under Section 447 of the Companies Act itself.

8. On the other hand, learned Senior Counsel Shri Kapil Sibal, appearing on behalf of Respondent No. 1, submitted that once investigation is over and a chargesheet has been filed, as has been done in the present case, the nature of allegations may not be a factor to decide if bail is to be granted. Instead, in such cases, the Court must consider whether the applicant has been cooperating in the investigation, and whether there is a

possibility that the applicant may abscond or tamper with evidence. At the same time, learned Senior Counsel was quick to caution that mere apprehension of tampering or absconding is not enough to deny bail, and that there should be an attempt at tampering with evidence or certainty that the petitioner would abscond if he is granted bail. Reliance was placed on ***State of Maharashtra* v. *Nainmal Punjaji Shah***, (1969) 3 SCC 904 to buttress this proposition. It was stressed that in the instant case, there had been no allegation of tampering with evidence or influencing witnesses against Respondent No. 1.

Learned Senior Counsel also referred to ***Y.S. Jagan Mohan Reddy*** (supra), where the Court had given the accused therein liberty to renew his prayer for bail once the chargesheet had been filed. He also highlighted that bail had been granted within five days after the chargesheet had been filed. The decision of this Court in ***Sanjay Chandra v. Central Bureau of Investigation***, (2012) 1 SCC 40, was also referred to, wherein bail had been granted since custody was felt to be unnecessary after the chargesheet had been filed.

It was also contended that since BSL has been taken over by the Tata Group, there was no possibility of tampering with any evidence, as all relevant documents were either in the possession of the new owners of BSL or of the Court.

Learned Senior Counsel further submitted that the Appellant had unfairly targeted Respondent No. 1 by arresting only him, although 287 parties, including 157 companies and 130 individuals, were named in the complaint. Further, he drew our attention to the order dated 16.08.2019 vide which the Special Judge has directed the parties to be summoned in batches until December 2019. It was further contended that the documents sought to be submitted by the Appellant ran into more than 70,000 pages, the perusal of which at the stage of framing of charges before the Special Judge would take a considerable amount of time. It was thus argued that if the present appeal before this Court were allowed, Respondent No.1, who has already spent 124 days in custody, would have to spend well over a year or more in custody even before the commencement of the trial.

With respect to the twin mandatory conditions under Section 212(6)(ii) of the Companies Act, learned Senior Counsel

highlighted that in ***Nikesh Tarachand Shah*** (supra), Section 45 of the PMLA had been held unconstitutional not only under Article 14, but also under Article 21 of the Constitution, as the said section made drastic inroads into the fundamental right of liberty without there being a compelling state interest. However, without going into the question of the constitutionality of Section 212(6) of the Companies Act itself, it was stressed that since the provision, as it exists, requires the Court to practically record a finding of acquittal in order to grant bail, it is well nigh impossible for an applicant to obtain bail under the provision.

Overall, it was contended that the High Court had used its discretion in granting bail in Respondent No.1 after applying its mind to the contents of the complaint and relevant legal propositions, and did not suffer from any perversity so as to warrant the intervention of this Court.

9. Having heard the learned Counsel on either side, we have perused the record.

10. It is pertinent to begin our discussion by referring to the mandatory conditions imposed under Section 212(6)(ii) for the grant of bail in connection with offences under Section 447 of the Companies Act. Sub-clause (ii) of Section 212(6) reads as follows:

> "(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), offence covered under section 447 of this Act shall be cognizable and no person accused of any offence under those sections shall be released on bail or on his own bond unless—
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> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail"

Although arguments have been advanced touching upon the scope and validity of the above provision, particularly in the aftermath of the decision of this Court in ***Nikesh Tarachand Shah*** (supra) pertaining to a similar provision in the PMLA, we do not find it appropriate to make any observations in this regard in light of the pendency of the challenge to the constitutionality of the said provision of the Companies Act before this Court.

11. At this juncture, it must be noted that even as per Section 212(7) of the Companies Act, the limitation under Section 212(6) with respect to grant of bail is in addition to those already provided in the Cr.P.C. Thus, it is necessary to advert to the principles governing the grant of bail under Section 439 of the Cr.P.C. Specifically, heed must be paid to the stringent view taken by this Court towards grant of bail with respect of economic offences. In this regard, it is pertinent to refer to the

following observations of this Court in ***Y.S. Jagan Mohan Reddy*** (supra):

> "**34.** Economic offences constitute a class apart and need to be visited with a different approach in the matter of bail. The 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.
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> **35.** While granting bail, the court has to keep in mind the nature of accusations, the nature of evidence in support thereof, the severity of the punishment which conviction will entail, the character of the accused, circumstances which are peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial, reasonable apprehension of the witnesses being tampered with, the larger interests of the public/State and other similar considerations."

This Court has adopted this position in several decisions, including ***Gautam Kundu* v. *Directorate of Enforcement (Prevention of Money Laundering Act), Government of India***, (2015) 16 SCC 1, and ***State of Bihar* v. *Amit Kumar***, (2017) 13 SCC 751. Thus, it is evident that the above factors must be taken into account while determining whether bail should be granted in cases involving grave economic offences.

12. As already discussed supra, it is apparent that the Special Court, while considering the bail applications filed by Respondent

No. 1 both prior and subsequent to the filing of the Investigation Report and complaint, has attempted to account not only for the conditions laid down in Section 212(6) of the Companies Act, but also of the general principles governing the grant of bail.

13. In our considered opinion, the High Court in the impugned order has failed to apply even these general principles. The High Court, after referring to certain portions of the complaint to ascertain the alleged role of Respondent No. 1, came to the conclusion that the role attributed to him was merely that of colluding with the co-accused promoters in the commission of the offence in question. The Court referred to the principles governing the grant of bail as laid down by this Court in ***Ranjitsing Brahmajeetsingh Sharma* v. *State of Maharashtra***, (2005) 5 SCC 294, which discusses the effect of the twin mandatory conditions pertaining to the grant of bail for offences under the Maharashtra Control of Organised Crime Act, 1999 as laid down in Section 21(4) thereof, similar to the conditions embodied in Section 212(6)(ii) of the Companies Act. However, the High Court went on to grant bail to Respondent No.

1 by observing that bail was justified on the "*broad probabilities*" of the case.

In our considered opinion, this vague observation demonstrates non-application of mind on the part of the Court even under Section 439 of the Cr.P.C., even if we keep aside the question of satisfaction of the mandatory requirements under Section 212(6)(ii) of the Companies Act.

14. Moreover, the fate of the co-accused promoters alleged to be the "*mind and will*" of the accused companies seems to have played heavily on the Court's mind. The High Court observed that while co-accused Brij Bhushan Singal had not been arrested due to his old age, co-accused Neeraj Singal had already been granted bail, vide order dated 29.08.2018. The Court noted that the order dated 29.08.2018 primarily dealt with the challenge mounted to the constitutional validity of various sub-sections of Section 212 of the Companies Act, and that though the operation of that order had been stayed by the Supreme Court, this was only because the observations made by the High Court in its order dated 29.08.2018 were of far-reaching consequences, and the release of such co-accused on bail had not been reversed.

We refrain from making any observations with respect to the proceedings pertaining to Neeraj Singal, particularly since the proceedings pertaining to the vires of Section 212(6)(ii) of the Companies Act that have arisen therefrom are pending before this Court, as already noted supra. However, we find it necessary to note that in light of the peculiar circumstances of the case, the High Court ought not to have been influenced by the non-arrest of Brij Bhushan Singal and the grant of bail to Neeraj Singal.

15. In light of the foregoing discussion, we are of the view that the High Court has failed to apply its mind to all the circumstances that were required to be considered while granting bail, particularly in relation to economic offences. Accordingly, the impugned order is hereby set aside.

16. In the interest of justice, we deem it fit to remand the matter to the High Court to reconsider Bail Application No. 1971/2019 filed by Respondent No.1 in light of the principles governing the grant of bail under Section 439 of the Cr.P.C, while also keeping in mind the scope and effect of the twin mandatory conditions for grant of bail laid down in Section 212(6)(ii) of the Companies Act. Needless to say, Respondent No. 1 shall continue to remain in

custody subject to the order of the High Court in the said bail application.

17. The impugned order of the High Court is set aside. This appeal is disposed of accordingly, with a request to the High Court to decide the bail application afresh at an early date, in accordance with law, and in the light of the aforesaid observations.

.....J.
(N.V. Ramana)

.....J.
(Mohan M. Shantanagoudar)

.....J.
(Ajay Rastogi)

New Delhi;
September 12, 2019.