

Tarsem Lal vs Directorate Of Enforcement Jalandhar ... on 16 May, 2024

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Bench: Abhay S. Oka

2024 INSC 434

REPORTAB

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.2608 OF 2024
(Arising out of Special Leave Petition (Crl.) No. 121 o

TARSEM LAL

...APPELLANT

VERSUS

DIRECTORATE OF ENFORCEMENT
JALANDHAR ZONAL OFFICE

...RESPONDENT

WITH

CRIMINAL APPEAL NO.2609 OF 2024 @ SLP (Crl.) NO. 191 of 202
CRIMINAL APPEAL NO.2610 OF 2024 @ SLP (Crl.) NO. 698 of 20
CRIMINAL APPEAL NO.2611 OF 2024 @ SLP (Crl.) NO. 330 of 202
CRIMINAL APPEALNO.2612 OF 2024 @ SLP (Crl.) NO. 743 of 202
CRIMINAL APPEAL NO.2613 OF 2024 @ SLP (Crl.) NO. 728 of 20
CRIMINAL APPEAL NO.2614 OF 2024 @ SLP (Crl.) NO. 969 of 202
CRIMINAL APPEAL NO.2615 OF 2024 @ SLP (Crl.) NO. 3928 of 20

JUDGMENT

ABHAY S. OKA, J.

FACTUAL ASPECTS

2. Since the issues involved are common and very little turns on facts, we broadly refer to the factual aspects. The appellants are the accused in complaints under Section 44 (1)

(b) of the Prevention of Money Laundering Act, 2002 (for short, 'the PMLA'). The appellants have been denied the benefit of anticipatory bail by the impugned orders. We are dealing with the cases of the accused who were not arrested after registration of the Enforcement Case Information Report (ECIR) till the Special Court took cognizance under the PMLA of an offence punishable under Section 4 of the PMLA. The cognizance was taken on the complaints filed under Section 44 (1)(b). These are the cases where the appellants did not appear before the Special Court after summons were served to them. The Special Court issued warrants for procuring their presence. After the warrants were issued, the appellants applied for anticipatory bail before the Special Court. The applications were rejected. Unsuccessful accused have preferred these appeals since the High Court has turned down their prayers. This Court, by interim orders, has protected the appellants from arrest.

SUBMISSIONS

3. The learned senior counsel, Mr Sidharth Luthra, appearing for the appellants in Criminal Appeal @ Special Leave Petition (Crl.) No.121 of 2024 and the learned counsel representing other appellants have made detailed submissions. We are summarising their submissions as follows:

(a) The power to arrest vesting in the officers of the Directorate of Enforcement (for short, 'the ED') under Section 19 of the PMLA cannot be exercised after the Special Court takes cognizance of the offence punishable under Section 4 of the PMLA;

(b) If an accused appears pursuant to the summons issued by the Special Court, there is no reason to issue a warrant of arrest against him or to take him into custody;

(c) There is nothing inconsistent between Section 88 of the Code of Criminal Procedure, 1973 (for short, 'the CrPC') and the provisions of the PMLA. On a conjoint reading of Sections 4 and 5 of the CrPC with Section 65 of the PMLA, it is apparent that all the provisions of the CrPC would apply to proceedings before the Special Court from the stage of filing a complaint under Section 44 (1)(b). Only those provisions of the CrPC that are inconsistent with the specific provisions of the PMLA will not apply. Reliance was placed upon the decision of this Court in the case of Ashok Munilal Jain & Anr. v. Assistant Director, Directorate of Enforcement 1. As there is no inconsistency between Section 88 of the CrPC and the provisions of the PMLA if, after service of summons, the accused offers to furnish bonds for appearance in terms of Section 88 of the CrPC, the Special Court should normally 1 (2018) 16 SCC 158 accept the bonds. After furnishing the bonds, if the accused fails to appear before the Special Court, recourse can always be taken by the Special Court to Section 89 by issuing a warrant for procuring the presence of the accused before the Special Court;

(d) Once cognizance is taken based on a complaint, the Special Court cannot exercise the power of remand under Section 167 (2) of the CrPC. After cognizance is taken, the power can be exercised at the highest under Section 309 (2) of the CrPC;

(e) In view of this Court's decision in Satender Kumar Antil v. Central Bureau of Investigation & Anr.2, as clarified in the subsequent decision in Satender Kumar Antil v. Central Bureau of

Investigation and Anr. 3, when during the investigation, the prosecution does not seek the custody of the accused, after the Court takes cognizance, there is no need to arrest the accused;

(f) When the accused is not arrested during the investigation, after he appears before the Special Court pursuant to a summons, it is not necessary for him to apply for bail. The Special Court can always take recourse to Section 88 of the CrPC. In such a situation, if the ED is seeking remand by taking recourse under Section 309(2) of the CrPC, it will be incumbent upon the Special Court to give an opportunity of 2 (2021) 10 SCC 773 3 (2022) 10 SCC 51; [2022] 10 S.C.R. 351 being heard to the accused and pass an order recording reasons in brief;

(g) As held in the second case of Satender Kumar Antil³, Section 170 of the CrPC is merely a procedural compliance. It is submitted that in case of an offence punishable under the PMLA, a complaint under Section 44 (1)(b) partakes the character of a report/chargesheet under Section 173 of the CrPC. Once cognizance is taken based on the complaint, the authorities cannot invoke Section 19 of the PMLA and arrest an accused who has not been arrested till the date of the Special Court taking cognizance. If they require custody of the accused for further investigation to enable them to file a supplementary complaint, the officers of the ED will have to apply to the Special Court for a grant of custody; and

(h) When an accused is not arrested until the filing of the complaint and when an accused appears pursuant to summons before the Special Court, Section 437 of the CrPC will not apply, and it is not necessary for the accused to seek bail.

4. The learned Additional Solicitor General Mr S V Raju submitted that:

(a) Once an accused appears before the Special Court, he is deemed to be in its custody. Though Section 437 of the CrPC may not apply, the accused must apply for bail under Section 439 of the CrPC;

(b) A Special Court takes cognizance of an offence under Section 4 of the PMLA based on a complaint only if a prima facie case of commission of the offence is made out. When the accused applies for bail under Section 439 of the CrPC, after cognizance is taken, the conditions incorporated in Section 45 (1) of the PMLA will apply to the bail application;

(c) An application made by the accused for furnishing bonds in terms of Section 88 is an application for grant of bail; therefore, Section 45 (1) of the PMLA will apply even to such application;

(d) The guidelines issued in the case of Satender Kumar Antil³, do not apply to special acts like the PMLA;

(e) After cognizance is taken on a complaint under Section 44 (1)(b), the ED has the right to make further investigation and file a supplementary complaint. For that purpose, the ED can always exercise its power under Section 19 of the PMLA to arrest the accused against whom the complaint is filed;

(f) Though an accused against whom an allegation of commission of an offence punishable under Section 4 of the PMLA is made can apply for grant of anticipatory bail, such application shall also be governed by the conditions in Section 45 (1). Relying upon the decision of this Court in the case of Vijay Madanlal Choudhary & Ors. v. Union of India & Ors.⁴, it is submitted that money laundering is an offence 4 2022 SCC OnLine SC 929; [2022] 6 SCR 382 against the nation. Therefore, taking into consideration the gravity and severity of the offence under the PMLA, mandatory compliance with the requirements of Section 45 (1) must always be ensured;

(g) In view of Section 65, read with Section 71 of the PMLA, the provisions of the PMLA will have an overriding effect over the provisions of the CrPC; and

(h) In none of these cases, the conditions incorporated under Section 45 (1) of the PMLA have been fulfilled; therefore, the appellants are disentitled to grant of anticipatory bail.

CONSIDERATION OF SUBMISSIONS

5. While dealing with the complaints under Section 44 (1)(b), this Court, in its judgment dated 8 th April 2024 in the case of Yash Tuteja & Anr. v Union of India & Ors. 5 dealt with the issue of the applicability of provisions of the CrPC to a complaint under Section 44 (1)(b) of the PMLA. While dealing with the said issue in paragraph 6, this Court held thus:

“6. The only mode by which the cognizance of the offence under Section 3, punishable under Section 4 of the PMLA, can be taken by the Special Court is upon a complaint filed by the Authority authorized on this behalf. Section 46 of PMLA provides that the provisions of the Cr.PC (including the provisions as to bails or bonds) shall apply to proceedings before a Special Court and for the purposes of the Cr.PC provisions, the Special Court shall be 5 2024 INSC 301 deemed to be a Court of Sessions. However, sub-section (1) of Section 46 starts with the words “save as otherwise provided in this Act.” Considering the provisions of Section 46(1) of the PMLA, save as otherwise provided in the PMLA, the provisions of the Code of Criminal Procedure, 1973 (for short, Cr. PC) shall apply to the proceedings before a Special Court.

Therefore, once a complaint is filed before the Special Court, the provisions of Sections 200 to 204 of the Cr.PC will apply to the Complaint. There is no provision in the PMLA which overrides the provisions of Sections 200 to Sections 204 of Cr.PC.

Hence, the Special Court will have to apply its mind to the question of whether a prima facie case of a commission of an offence under Section 3 of the PMLA is made out in a complaint under Section 44(1)(b) of the PMLA. If the Special Court is of the view that no prima facie case of an offence under Section 3 of the PMLA is made out, it must exercise the power under Section 203 of the Cr.PC to dismiss the complaint. If a prima facie case is made out, the Special Court can take recourse to Section 204 of the Cr. PC.” (emphasis added)

6. If the Special Court concludes that a prima facie case of commission of an offence under the PMLA is made out in the complaint, it can order the issue of process in accordance with Section 204 (1) of the CrPC. Section 204 of the CrPC reads thus:

“204. Issue of process.—(1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be—

(a) a summons case, he shall issue his summons for the attendance of the accused, or

(b) a warrant case, he may issue a warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has no jurisdiction himself) some other Magistrate having jurisdiction.

(2) No summons or warrant shall be issued against the accused under sub-section (1) until a list of the prosecution witnesses has been filed.

(3) In a proceeding instituted upon a complaint made in writing, every summons or warrant issued under sub-section (1) shall be accompanied by a copy of such complaint. (4) When by any law for the time being in force any process fees or other fees are payable, no process shall be issued until the fees are paid and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

(5) Nothing in this section shall be deemed to affect the provisions of Section 87.”
(emphasis added)

7. As the punishment for an offence punishable under Section 4 of the PMLA is of imprisonment for more than three years, in view of clause (x) of Section 2 of the CrPC, the complaint will be treated as a warrant case. Under Section 204(1)(b), the Court can issue either a warrant or summons in a warrant case. Therefore, while taking cognizance, the Special Court has the discretion to issue either a summons or warrant. Regarding the discretion under Section 204 (1)(b), this Court has laid down the law in the case of *Inder Mohan Goswami & Anr. v. State of Uttaranchal & Ors*⁶. This Court held that as a general rule, unless an accused is charged with an offence of heinous crime and it is feared that he is likely to tamper with or destroy the evidence or evade the process of law, the issue of summons is the rule. This Court held that in a complaint case, at the first instance, the Court should direct serving of summons along with the copy of complaint. If service is avoided by the accused, initially, a bailable warrant should be issued. If that is not effective, a non-bailable warrant should be issued. Paragraphs 55 and 56 of the said decision read thus:

“55. In complaint cases, at the first instance, the court should direct serving of the summons along with the copy of the complaint. If the accused seem to be avoiding the summons, the court, in the second instance should issue bailable 6 (2007) 12 SCC 1; [2007] 10 SCR 847 warrant. In the third instance, when the court is fully satisfied

that the accused is avoiding the court's proceeding intentionally, the process of issuance of the non-bailable warrant should be resorted to.

Personal liberty is paramount, therefore, we caution courts at the first and second instance to refrain from issuing non-bailable warrants.

56. The power being discretionary must be exercised judiciously with extreme care and caution. The court should properly balance both personal liberty and societal interest before issuing warrants. There cannot be any straitjacket formula for issuance of warrants but as a general rule, unless an accused is charged with the commission of an offence of a heinous crime and it is feared that he is likely to tamper or destroy the evidence or is likely to evade the process of law, issuance of non-bailable warrants should be avoided.” (emphasis added) As noted earlier, a complaint under Section 44(1)(b) of the PMLA will be governed by Sections 200 to 204 of the CrPC. Hence, the law laid down by this Court in the above decision will apply to a complaint under Section 44(1)(b).

8. While taking cognizance on a complaint under Section 44 (1)(b), if the Court finds that till the filing of the complaint, the accused was not arrested, generally at the first instance, as a rule, the Court must issue a summons on the complaint. If the accused was not arrested till the filing of the complaint but has not cooperated with the investigation by defying summons issued under Section 50 of the PMLA, the Special Court may issue a bailable warrant at the first instance while issuing the process. But even in such a case, it is not mandatory to issue a warrant while issuing process; instead issuance of a summons would suffice. When an accused is on bail, while issuing the process, the Special Court will have to issue only a summons. When the accused is granted bail in the same case, it is not necessary to arrest him after taking cognizance. If such an accused does not remain present after service of summons without seeking an exemption, the Special Court can always issue a warrant to secure his presence.

9. Section 61 of the CrPC provides for the form of summons. Form No. 1 in the 2nd Schedule is the prescribed form of summons under Section 61 of the CrPC. For the sake of convenience, we are reproducing Form No. 1:

FORM 1 [See Section 61] Summons to an accused person To (name of accused) of (address). Whereas your attendance is necessary to answer to a charge of (state shortly the offence charged), you are hereby required to appear in person (or by pleader, as the case may be) before the (Magistrate) of _____, on the _____ day of _____ Herein fail not.

Dated, this _____ day of _____, 20____

(Seal of the Court)

(Signature)

Looking at the form of the summons, it is apparent that it is issued only to secure the presence of the accused before the Court to answer the charge. If the accused appears before the Court, there is sufficient compliance with the summons.

Hence, the question of taking him into custody on his appearance before the Court pursuant to the summons does not arise at all.

10. We fail to understand the basis of the submission of the learned ASG that after an accused appears before a Special Court in compliance with the summons, he shall be deemed to be in custody. The object of issuing a summons is to secure the accused's presence before the Court. It is not issued for taking an accused in custody. An argument is made that once an accused appears before the Special Court, as provided under sub-Section (1) of Section 437, he has to apply for bail. For ready reference, we are reproducing sub-Section (1) of Section 437, which reads thus:

“437. When bail may be taken in case of non-bailable offence.— (1) When any person accused of, or suspected of, the commission of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of session, he may be released on bail, but—

(i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;

(ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years:

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court:

Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-Section without giving an opportunity of hearing to the Public Prosecutor.” (emphasis added) On its plain reading, sub-Section (1) of Section 437 does not apply when an accused appears or is brought before a High Court or Sessions Court. A Special Court is appointed under sub-Section (1) of Section 43 of the PMLA, which reads thus:

“43. Special Courts.—(1) The Central Government, in consultation with the Chief Justice of the High Court, shall, for trial of offence punishable under Section 4, by notification, designate, one or more Courts of Session as Special Court or Special Courts for such area or areas or for such case or class or group of cases as may be specified in the notification.

Explanation.—In this sub-Section, “High Court” means the High Court of the State in which a Sessions Court designated as Special Court was functioning immediately before such designation.

(2).....” Section 44 (1)(d) provides that while trying a scheduled offence or offence under the PMLA, a Special Court shall hold the trial in accordance with the provisions of the CrPC as they apply to trial before a Court of Session. A Special Court is a Court of Session. Therefore, Section 437 will not apply when an accused appears before the Special Court after a summons is issued on a complaint under Section 44 (1)(b) of the PMLA.

11. There are provisions in the CrPC which show that an accused who appears before the Court under a summons issued on a complaint cannot be treated as if he is in a deemed custody. One such provision is Section 205 of the CrPC, which reads thus:

“205. Magistrate may dispense with personal attendance of accused.—(1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in the manner hereinbefore provided.” (emphasis added) We will examine whether Section 205 of the CrPC will apply to a complaint under Section 44(1)(b) of the PMLA. Sections 65 and 71 of the PMLA read thus:

“65. Code of Criminal Procedure, 1973 to apply.—The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall apply, in so far as they are not inconsistent with the provisions of this Act, to arrest, search and seizure, attachment, confiscation, investigation, prosecution and all other proceedings under this Act.” “71. Act to have overriding effect.—The provisions of this Act shall have effect notwithstanding

anything inconsistent therewith contained in any other law for the time being in force.” After carefully perusing the provisions of the PMLA, we find that there is no provision therein which is in any manner inconsistent with Section 205 of the CrPC. Hence, it will apply to a complaint under the PMLA. A summons is issued on a complaint to ensure attendance of the accused before the Criminal Court. If an accused is in custody, no occasion arises for a Court to dispense with the personal attendance of the accused. We may note here that Section 205 empowers the Court to grant exemption only when a summons is issued. Sub-section (2) of Section 205 provides for enforcing the attendance of the accused before the Court at the time of the trial. If the accused who appears pursuant to the summons issued on a complaint were deemed to be in custody, the lawmakers would not have provided for Section

205. Hence, we reject the argument of the learned ASG that once an accused appears before the Special Court on a summons being served to him, he shall be deemed to be in custody.

12. Now, we come to Section 88 of the CrPC. Section 88 reads thus:

“88. Power to take bond for appearance. —When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court, or any other Court to which the case may be transferred for trial.” If a summons on a complaint is issued and the accused appears on the returnable date, it is not necessary in every case to direct the accused to furnish bonds as required by Section 88. It is an enabling provision that permits the Court to direct the accused to furnish bonds considering the facts of each case. Based on the submissions made across the Bar, there are three issues concerning Section 88, which are as under:

(i) Whether Section 88 applies to an accused who has been served with a summons or applies to an accused who appears before the Court before the summons is issued or served?

(ii) Will Section 88 apply to a complaint under the PMLA?

(iii) Whether an order issued by a Criminal Court to the accused to furnish bonds in accordance with Section 88 amounts to a grant of bail?

13. Firstly, after examining the provisions of the PMLA, it is apparent that Section 88 is in no manner inconsistent with the provisions of the PMLA. Therefore, Section 88 will apply after filing of a complaint under Section 44(1)(b) of the PMLA. If Section 88 is to apply even before a summons is issued or served upon a complaint, there is no reason why it should not apply after the service of summons. A discretionary power has been conferred by Section 88 on the Court to call upon the accused to furnish bonds for his appearance before the Court. It does not depend on the willingness

of the accused. The object of Section 88 is to ensure that the accused regularly appears before the Court. Section 88 is a part of Chapter VI of the CrPC under the heading “Processes to Compel Appearance”. Section 61, which deals with the form of summons and mode of service of summons, is a part of the same Chapter. When a summons is issued after taking cognizance of a complaint to an accused, he is obliged to appear before the Criminal Court on the date fixed in the case unless his presence is exempted by an express order passed in the exercise of powers under Section 205 of the CrPC. Therefore, when an accused appears pursuant to a summons issued on the complaint, the Court will be well within its powers to take bonds under Section 88 from the accused to ensure his appearance before the Court. Therefore, when an accused appears before the Special Court under a summons issued on the complaint, if he offers to submit bonds in terms of Section 88, there is no reason for the Special Court to refuse or decline to accept the bonds. Executing a bond will aid the Special Court in procuring the accused's presence during the trial.

14. A decision of this Court in the case of Pankaj Jain v. Union of India and Anr.⁷ had an occasion to deal with the issue. The occasion to consider the provision of Section 88 was the word “may” used in the Section. We may conveniently reproduce paragraphs 21 and 22 of the said decision, which reads thus:

“21. This Court in *State of Kerala v. Kandath Distilleries* [*State of Kerala v. Kandath Distilleries*, (2013) 6 SCC 573] came to consider the use of expression “may” in the Kerala Abkari Act, 1902. The Court held that the expression conferred discretionary power on the Commissioner and power is not coupled with duty. Following observation has been made in para 29: (SCC p. 584) “29. Section 14 uses the expression “Commissioner may”, “with the approval of the Government” so also Rule 4 uses the expressions “Commissioner may”, “if he is 7 (2018) 5 SCC 743; [2018] 9 SCR 248 satisfied” after making such enquiries as he may consider necessary “licence may be issued”. All those expressions used in Section 14 and Rule 4 confer discretionary powers on the Commissioner as well as the State Government, not a discretionary power coupled with duty.” (emphasis in original)

22. Section 88 of the CrPC does not confer any right on any person, who is present in a court. Discretionary power given to the court is for the purpose and object of ensuring appearance of such person in that court or to any other court into which the case may be transferred for trial. Discretion given under Section 88 to the court does not confer any right on a person, who is present in the court rather it is the power given to the court to facilitate his appearance, which clearly indicates that use of the word “may” is discretionary and it is for the court to exercise its discretion when situation so demands. It is further relevant to note that the word used in Section 88 “any person” has to be given wide meaning, which may include persons, who are not even accused in a case and appeared as witnesses.” (emphasis added) This Court, in the aforesaid decision, dealt with a case where Section 437 of the CrPC was applicable. We have already held that in case of a complaint under Section 44(1)(b) of the PMLA, Section 437 will have no application. Thereafter, this Court discussed the issue as to in what manner discretion should be exercised. Paragraphs 27 to 29 deal

with this issue which read thus:

“27. Another judgment relied upon by the appellant is the judgment of the Punjab & Haryana High Court in *Arun Sharma v. Union of India* [*Arun Sharma v. Union of India*, 2016 SCC OnLine P&H 5954 : (2016) 3 RCR (Cri) 883] . In the above case, the Punjab & Haryana High Court was considering Section 88 CrPC read with Section 65 of the Prevention of Money Laundering Act. In the above context, following has been observed in para 11: (SCC OnLine P&H) “11. On the same principles, in absence of anything inconsistent in PMLA with Section 88 CrPC, when a person voluntarily appears before the Special Court for PMLA pursuant to issuance of process vide summons or warrant, and offers submission of bonds for further appearances before the court, any consideration of his application for furnishing such bond, would be necessarily governed by Section 88 CrPC read with Section 65 of PMLA. Section 88 CrPC reads as follows:

‘88. Power to take bond for appearance.— When any person for whose appearance or arrest the officer presiding in any court is empowered to issue a summons or warrant, is present in such court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such court, or any other court to which the case may be transferred for trial.’ This Section 88 (corresponding to Section 91 CrPC, 1898) would not apply qua a person whose appearance is not on his volition, but is brought in custody by the authorities as held by the Constitution Bench of the Hon'ble Supreme Court in *Madhu Limaye v. Ved Murti* [*Madhu Limaye v. Ved Murti*, (1970) 3 SCC 739] , wherein it was observed that: (SCC p. 745, para 17) ‘17. ... In fact Section 91 applies to a person who is present in court and is free because it speaks of his being bound over, to appear on another day before the court. That shows that the person must be a free agent whether to appear or not. If the person is already under arrest and in custody, as were the petitioners, their appearance depended not on their own volition but on the volition of the person who had their custody.’ Thus, in a situation like this where the accused were not arrested under Section 19 of PMLA during investigations and were not produced in custody for taking cognizance, Section 88 CrPC shall apply upon appearance of the accused person on his own volition before the trial court to furnish bonds for further appearances.”

28. The present is not a case where accused was a free agent whether to appear or not. He was already issued non-bailable warrant of arrest as well as proceeding of Sections 82 and 83 CrPC had been initiated. In this view of the matter, he was not entitled to the benefit of Section 88.

29. In the Punjab & Haryana case, the High Court has relied on judgment of this Court in *Madhu Limaye v. Ved Murti* [*Madhu Limaye v. Ved Murti*, (1970) 3 SCC 739] and held that Section 88 shall be applicable since accused were not arrested under Section 19 of PMLA during investigation and were not taken into custody for taking cognizance. What the Punjab & Haryana High Court missed, is that this Court

in the same paragraph had observed “that shows that the person must be a free agent whether to appear or not”. When the accused was issued warrant of arrest to appear in the court and proceeding under Sections 82 and 83 CrPC has been initiated, he cannot be held to be a free agent to appear or not to appear in the court. We thus are of the view that the Punjab & Haryana High Court has not correctly applied Section 88 in the aforesaid case.” (emphasis added) Therefore, if a warrant of arrest has been issued and proceedings under Section 82 and/or 83 of the CrPC have been issued against an accused, he cannot be let off by taking a bond under Section 88. Section 88 is indeed discretionary.

But this proposition will not apply to a case where an accused in a case under the PMLA is not arrested by the ED till the filing of the complaint. The reason is that, in such cases, as a rule, a summons must be issued while taking cognizance of a complaint. In such a case, the Special Court may direct the accused to furnish bonds in accordance with Section 88 of the CrPC.

15. Now, we come to the issue of whether an order of the Court accepting bonds under Section 88 amounts to grant of bail. If an accused appears pursuant to a summons issued on the complaint, he is not in custody. Therefore, there is no question of granting him bail. Moreover, even if the accused who appears before the Court does not offer to submit bonds under Section 88 of the CrPC, the Court can always direct him to do so. A bond furnished according to Section 88 is an undertaking to appear before the Court on the date fixed. The question of filing bail bonds arises only when the Court grants bail. When an accused furnishes a bond in accordance with Section 88 of the CrPC for appearance before a Criminal Court, he agrees and undertakes to appear before the Criminal Court regularly and punctually and on his default, he agrees to pay the amount mentioned in the bond. Section 441 of the CrPC deals with a bond to be furnished by an accused when released on bail. Therefore, in our considered view, an order accepting bonds under Section 88 from the accused does not amount to a grant of bail.

16. Now, we deal with a contingency where after service of summons issued on a complaint under the PMLA, the accused does not appear. One category of such cases can be where the accused appears on the returnable date of the summons and subsequently does not appear, notwithstanding the furnishing of bonds under Section 88. The other category of cases is where, after the service of summons is made on the complaint, the accused does not appear. This category will also include a case where the accused appears on returnable date, but on a subsequent date fails to appear. In the first contingency, where the accused does not appear in breach of the bond furnished under Section 88, Section 89 of the CrPC confers sufficient powers on the Court to take care of the situation. Section 89 reads thus:

“89. Arrest on breach of bond for appearance.—When any person who is bound by any bond taken under this Code to appear before a Court, does not appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.” The warrant contemplated by Section 89 can be a bailable or non-bailable warrant.

17. Even if a bond is not furnished under Section 88 by an accused and if the accused remains absent after that, the Court can always issue a warrant under Section 70 (1) of the CrPC for procuring the presence of the accused before the Court. In both contingencies, when the Court issues a warrant, it is only for securing the accused's presence before the Court. When a warrant is issued in such a contingency, it is not necessary for the accused to apply for bail. Section 70, which confers power on the Court to issue a warrant, indicates that the Court which issues the warrant has the power to cancel it. Section 70 reads thus:

“70. Form of warrant of arrest and duration.—(1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer of such Court and shall bear the seal of the Court.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.” (emphasis added) Thus, sub-section (2) of Section 70 confers power on the Court to cancel the warrant. When a bailable warrant is issued to an accused on the grounds of his non-appearance, he is entitled to be enlarged on bail as a matter of right when he appears before the Court. Therefore, he need not apply for cancellation of the warrant.

18. When a warrant is issued in the cases mentioned in paragraph 16 above, the Special Court can always entertain an application for cancellation of the warrant and can cancel the warrant depending upon the conduct of the accused. While cancelling the warrant, the Court can always take an undertaking from the accused to appear before the Court on every date unless appearance is specifically exempted. When the ED has not taken the custody of the accused during the investigation, usually, the Special Court will exercise the power of cancellation of the warrant without insisting on taking the accused in custody provided an undertaking is furnished by the accused to appear regularly before the Court. When the Special Court deals with an application for cancellation of a warrant, the Special Court is not dealing with an application for bail. Hence, Section 45(1) will have no application to such an application.

19. At this stage, we may refer to a decision of this Court in the case of Satender Kumar Antil³. While dealing with Sections 88, 170, 204, and 209 of the CrPC, in paragraphs 100.5, this Court held thus:

“100.5. There need not be any insistence of a bail application while considering the application under Sections 88, 170, 204 and 209 of the Code.” At this stage, we may note here that from paragraphs 86 to 89 of the same decision, this Court dealt with category of special acts. In paragraph 89, this Court held thus:

“89. We may clarify on one aspect which is on the interpretation of Section 170 of the Code. Our discussion made for the other offences would apply to these cases also. To clarify this position, we may hold that if an accused is already under incarceration, then the same would continue, and therefore, it is needless to say that the provision of the Special Act would get applied thereafter. It is only in a case where the accused is either not arrested consciously by the prosecution or arrested and enlarged on bail,

there is no need for further arrest at the instance of the court. Similarly, we would also add that the existence of a *pari materia* or a similar provision like Section 167(2) of the Code available under the Special Act would have the same effect entitling the accused for a default bail. Even here the court will have to consider the satisfaction under Section 440 of the Code.” (emphasis added)

20. Once cognizance is taken of the offence punishable under Section 4 of the PMLA, the Special Court is seized of the matter. After the cognizance is taken, the ED and other authorities named in Section 19 cannot exercise the power of arrest of the accused shown in the complaint. The reason is that the accused shown in the Complaint are under the jurisdiction of the Special Court dealing with the complaint.

Therefore, after cognizance of the complaint under 44(1)(b) of the PMLA is taken by the Court, the ED and other authorities named in Section 19 are powerless to arrest an accused named in the complaint. Hence, in such a case, an apprehension that the ED will arrest such an accused by exercising powers under Section 19 can never exist.

21. We are informed across the Bar by the learned counsel of the appellants that some of the Special Courts under the PMLA are following the practice of taking the accused into custody after they appear pursuant to the summons issued on the complaint. Therefore, the accused are compelled to apply for bail or for anticipatory bail apprehending arrest upon issuance of summons. We cannot countenance a situation where, before the filing of the complaint, the accused is not arrested; after the filing of the complaint, after he appears in compliance with the summons, he is taken into custody and forced to apply for bail. Hence, such a practice, if followed by some Special Courts, is completely illegal. Such a practice may offend the right to liberty guaranteed by Article 21 of the Constitution of India. If the ED wants custody of the accused who appears after service of summons for conducting further investigation in the same offence, the ED will have to seek custody of the accused by applying to the Special Court. After hearing the accused, the Special Court must pass an order on the application by recording brief reasons. While hearing such an application, the Court may permit custody only if it is satisfied that custodial interrogation at that stage is required, even though the accused was never arrested under Section

19. However, when the ED wants to conduct a further investigation concerning the same offence, it may arrest a person not shown as an accused in the complaint already filed under Section 44(1)(b), provided the requirements of Section 19 are fulfilled.

ON FACTUAL ASPECTS OF THE APPEALS

22. Coming back to the facts of the cases before us, warrants were issued to the appellants as they did not appear before the Special Court after the service of summons. As held earlier, the appellants could have applied for cancellation of warrants issued against them as the warrants were issued only to secure their presence before the Special Court. Instead of applying for cancellation of warrants, the appellants applied for anticipatory bail. All of them were not arrested till the filing of the complaint and have co-operated in the investigation. Therefore, we propose to direct that the

warrants issued against the appellants shall stand cancelled subject to the condition of the appellants giving undertakings to the respective Special Courts to regularly and punctually attend the Special Court on all dates fixed unless specifically exempted by the exercise of powers under Section 205 of the CrPC. The second condition will be furnishing bonds to the Special Court in terms of Section 88 of the CrPC.

OPERATIVE CONCLUSIONS

23. Now, we summarise our conclusions as under:

- a) Once a complaint under Section 44 (1)(b) of the PMLA is filed, it will be governed by Sections 200 to 205 of the CrPC as none of the said provisions are inconsistent with any of the provisions of the PMLA;
- b) If the accused was not arrested by the ED till filing of the complaint, while taking cognizance on a complaint under Section 44(1)(b), as a normal rule, the Court should issue a summons to the accused and not a warrant. Even in a case where the accused is on bail, a summons must be issued;
- c) After a summons is issued under Section 204 of the CrPC on taking cognizance of the offence punishable under Section 4 of the PMLA on a complaint, if the accused appears before the Special Court pursuant to the summons, he shall not be treated as if he is in custody. Therefore, it is not necessary for him to apply for bail. However, the Special Court can direct the accused to furnish bond in terms of Section 88 of the CrPC;
- d) In a case where the accused appears pursuant to a summons before the Special Court, on a sufficient cause being shown, the Special Court can grant exemption from personal appearance to the accused by exercising power under Section 205 of the CrPC;
- e) If the accused does not appear after a summons is served or does not appear on a subsequent date, the Special Court will be well within its powers to issue a warrant in terms of Section 70 of the CrPC. Initially, the Special Court should issue aailable warrant. If it is not possible to effect service of theailable warrant, then the recourse can be taken to issue a non-ailable warrant;
- f) A bond furnished according to Section 88 is only an undertaking by an accused who is not in custody to appear before the Court on the date fixed. Thus, an order accepting bonds under Section 88 from the accused does not amount to a grant of bail;
- g) In a case where the accused has furnished bonds under Section 88 of the CrPC, if he fails to appear on subsequent dates, the Special Court has the powers under

Section 89 read with Sections 70 of the CrPC to issue a warrant directing that the accused shall be arrested and produced before the Special Court; If such a warrant is issued, it will always be open for the accused to apply for cancellation of the warrant by giving an undertaking to the Special Court to appear before the said Court on all the dates fixed by it. While cancelling the warrant, the Court can always take an undertaking from the accused to appear before the Court on every date unless appearance is specifically exempted. When the ED has not taken the custody of the accused during the investigation, usually, the Special Court will exercise the power of cancellation of the warrant without insisting on taking the accused in custody provided an undertaking is furnished by the accused to appear regularly before the Court. When the Special Court deals with an application for cancellation of a warrant, the Special Court is not dealing with an application for bail. Hence, Section 45(1) will have no application to such an application;

h) When an accused appears pursuant to a summons, the Special Court is empowered to take bonds under Section 88 of the CrPC in a given case. However, it is not mandatory in every case to direct furnishing of bonds. However, if a warrant of arrest has been issued on account of non-appearance or proceedings under Section 82 and/or Section 83 of the CrPC have been issued against an accused, he cannot be let off by taking a bond under Section 88 of the CrPC, and the accused will have to apply for cancellation of the warrant;

i) After cognizance is taken of the offence punishable under Section 4 of the PMLA based on a complaint under Section 44 (1)(b), the ED and its officers are powerless to exercise power under Section 19 to arrest a person shown as an accused in the complaint; and

j) If the ED wants custody of the accused who appears after service of summons for conducting further investigation in the same offence, the ED will have to seek custody of the accused by applying to the Special Court. After hearing the accused, the Special Court must pass an order on the application by recording brief reasons. While hearing such an application, the Court may permit custody only if it is satisfied that custodial interrogation at that stage is required, even though the accused was never arrested under Section

19. However, when the ED wants to conduct a further investigation concerning the same offence, it may arrest a person not shown as an accused in the complaint already filed under Section 44(1)(b), provided the requirements of Section 19 are fulfilled.

24. We are making it clear that we are dealing with a fact situation where the accused shown in the complaint under Section 44(1)(b) of the PMLA was not arrested by the ED by the exercise of power under Section 19 of the PMLA till the complaint was filed.

25. Hence, the appeals succeed, and we pass the following order:

- a) We set aside the impugned orders declining to grant anticipatory bail;
- b) We direct that warrants issued by the Special Courts against the appellants shall stand cancelled subject to the following conditions:
 - i. The appellants shall appear before the concerned Special Court within one month from today and shall file an undertaking before the Special Court that they shall regularly and punctually appear before the Special Court on the dates fixed unless their appearance is specifically exempted by the exercise of powers under Section 205 of the CrPC; and ii. The appellants shall furnish bonds in accordance with Section 88 of the CrPC to the satisfaction of the Special Court within one month from today.
- c) It is necessary to clarify that the warrants issued against the appellants shall be cancelled only if they make compliance as aforesaid within one month from today. To enable them to do so, the warrants shall not be executed against them for a period of one month from today;
- d) On the failure of the appellants to appear before the Special Court and to file undertakings and bonds within one month from today, it will be open for the Special Courts to issue warrants against the appellants; and
- e) After the warrants issued against the appellants are cancelled, the apprehension that they may be arrested will not survive. Hence, in view of what we have held in this judgment, it is unnecessary to consider the prayer for the grant of anticipatory bail.

26. The appeals are allowed on the above terms.

.....J. (Abhay S. Oka)J. (Ujjal Bhuyan) New Delhi;

May 16, 2024.