Ajay Jain vs State Of Chhattisgarh on 4 May, 2022

Author: Sanjay K. Agrawal

Bench: Sanjay K. Agrawal, Rajani Dubey

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HIGH COURT OF CHHATTISGARH, BILASPUR
Criminal Appeal No.328 of 2022
Judgment reserved on: 8.4.2022
Judgment delivered on: 4.5.2022

Ajay Jain S/o Prakash Chand Jain, Aged-42 Year, R/o E-5, Riddhi-Siddhi Phase-II, District Rajnandgaon, Chhattisgarh

---- Appellant
(In Jail)

Versus

State of Chhattisgarh Through Station House officer, Police Station Siksod, Tehsil-Antagarh, District Kanker (CG)

---- Respondent

For Appellant: Mr.Siddharth Shukla, Advocate
For Respondent/State: Mr.Sunil Otwani, Addl.Advocate General with Mr.Ashish Tiwari, Govt.Advocate

Hon'ble Shri Justice Sanjay K. Agrawal and
Hon'ble Smt. Justice Rajani Dubey

C.A.V. Judgment

Sanjay K. Agrawal, J.

1. This criminal appeal under Section 21(4) of the National Investigation Agency Act, 2008 is directed against the order dated 14.1.2022 passed by the Special Judge (NIA Act), Kanker, District□ Uttar Bastar Kanker in Bail Application No.17/2022 by which the appellant's application under Section 439 of the CrPC seeking bail for offences under Sections 10,13,17,38(1)(a)(2) & 40 of the Unlawful Activities Prevention Act, 1967 (hereinafter called as 'UAPA'), Section 8(2)(3)(5) of the Chhattisgarh Vishesh Jan Surksha Adhiniyam, 2005 (hereinafter called as 'Act of 2005') and Sections 120B, 201 and 149/34 of the IPC has been rejected finding no merit.

2. As per case of the prosecution, on 24.3.2020 on the basis of secret information, the respondent searched a vehicle bearing registration No.CG 07 AH 6555 driven by Tapas Kumar Palit. In that

search, 95 pairs of shoes, green black printed cloths for uniform, 2 bundles of electric wires each of 100 meter, LED lens, walki talki and other articles were found in his possession (Tapas Kumar Palit). Seizure was made accordingly. It is further case of the prosecution that these articles were to be supplied by Tapas Kumar Palit to naxalites in order to support their illegal and disruptive activities. It is further case of the prosecution that said Tapas Kumar Palit was working with Rudransh Earth Movers Road Construction Company, a partnership firm of appellant Ajay Jain and one Komal Verma. It is further case of the prosecution that Tapas Kumar Palit provided information that articles were being provided on the instructions/consent of Ajay Jain and Komal Verma, who were given consent/permission to do so by Varun Jain, Director of M/s Landmark Royal Engineering (India) Private Limited. It is also the case of the prosecution that the accused were providing funds as well to naxalites though no cash was recovered on the said date, but the police arrested all of them including the appellant on 23.4.2020. It is also case of the prosecution that the present appellant and Komal Verma were working as sub contractor for road construction of PMGSY Road work originally given to M/s Landmark Royal Engineering Private Limited, FIR No.9/2020 was registered and they were charge sheeted for the aforesaid offences on 8.9.2020 and thereafter charges have been framed on 5.8.2021 and out of 100 listed witnesses, only 13 witnesses have been examined and seizure witness namely Mantesh Dhruw and Rajesh Sahu have also been examined. The appellant herein has filed an application under Section 439 of the CrPC for grant of bail before the Special Court under NIA Act, which has been rejected by the impugned order finding that the appellant and one co accused Arun Jain provided Rs.2,50,000/ to naxalites for their alleged illegal activities and thereby rejected the same, against which, this criminal appeal has been filed.

3. Mr.Siddharth Shukla, learned counsel appearing for the appellant, would submit that the alleged offence registered against the appellant under Sections 10 and 13 of the UAPA falls in Part III of the UAPA, thus, the Bar of granting bail under Section 43(D) 5 of the UAPA would not be applicable. He would further submit that Section 17 deals with punishment for raising funds for the terrorist Act and Section 22A & 22C fixes the responsibility of any offence committed under the said Act. Thus, the said sections does not constitute any separate offence. He would also submit that Section 38(1)(2) deals with offence for being a member of the terrorist organization and Section 40 of the UAPA deals with offence for raising funds for a terrorist organization. He would also submit that charge under Section 8(2)(3)(5) of the Act of 2005 deals with membership, management of a banned organization, which is not even supported by the charge sheet, which categorically says that the appellant was providing money and articles in lieu of smooth functioning of the road construction contracts. In any case, there is no bar like Section 43D(5) of the UAPA in the Act of 2005. He would further submit that the main accusation against the appellant herein is that he paid levy/extortion amount to naxalites for undertaking road construction work in Kanker, but in the light of decision of the Supreme Court in the matter of Sudesh Kedia v. Union of India1, payment of 1 (2021) 4 SCC 704 extortion money to a banned/terror organization does not amount to terror funding and even if the charge sheet is taken as whole along with other material on record that the appellant was paying the extortion amounts for letting them work smoothly in the said area. At the best, it will constitute extortion money only as held by the Supreme Court in Sudesh Kedia (supra) that payment of extortion money to naxalites/banned organization as a return for smooth functioning of business does not amount to terror funding under the UAPA and relied upon paras

13.1, 13.2 and 13.3 of Sudesh Kedia's case (supra). He would further submit that the appellant has been implicated in this case merely on the basis of confessional statement recorded during the investigation by the respondent, which is inadmissible in law in view of provisions contained in Sections 25 and 26 of the Indian Evidence Act. He would also submit that not a single incriminating material i.e. money, cloths, wireless etc. were recovered from the appellant on the basis of co-accused confession. He would submit that mere association with a terrorist organization as a member is not sufficient to attract Section 38 of the UAPA as held by the Supreme Court in the matter of Thwaha Fasal v. Union of India2. The respondent has 2 2021 SCC OnLine SC 1000 miserably failed to show any incriminating evidence which can remotely suggest that the appellant was raising fund for naxalites being a member of the said organization and was continuously participating with them in their meetings with the intention to further activity of terror organization and as such, charge under Sections 17, 38 and 40 of the UAPA is misconceived. He would also submit that Varun Jain, Director of M/s Landmark Royal Engineering (India) Private Limited has been impleaded as co-accused, who is principal employer of the appellant and he has been granted interim bail by the Supreme Court in SLP (Crl) No.8147-8148/2021 vide order dated 3.1.2022. The appellant is in jail since 23.4.2020 and the trial is likely to take time and out of 100 listed witnesses, only 13 witnesses have been examined and as such, the impugned order is liable to be set aside and the appellant is entitled to be released on regular bail.

4. On the other hand, Mr.Sunil Otwani, learned Additional Advocate General for the respondent/State while vehemently opposing the submissions of the learned counsel for the appellant would submit that the appellant is not entitled to be admitted to the privilege of regular bail in view of decision of the Supreme Court in the matter of National Investigation Agency v. Zahoor Ahmad Shah Watali 3 (paras-25 and 27) as charges have been framed against the appellant herein on 5.8.2021 and bail application of co-accused Varun Jain and Nitesh Agrawal has been rejected and their criminal appeals have also been rejected by this Court and against which, SLP is pending before the Supreme Court and only interim bail has been granted and as such, the appellant is not entitled to be released on bail. He would further submit that in the matter of Sudesh Kedia (supra), the issue with regard to framing of charge and grant of bail has not been considered by the Supreme Court, to which Mr.Siddharth Shukla, learned counsel for the appellant, replied that in the matter of Union of India v. K.A.Najeeb4, 3-Judge Bench of the Supreme Court has considered and distinguished the decision of Zahoor Ahmad Shah Watali (supra) and even the High Court has granted bail which was affirmed by the Supreme Court and in that case, charges have also been framed. As per Mr.Otwani, learned Additional Advocate General, criminal appeal deserves to be dismissed.

5. We have heard the learned appearing for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.

3 (2019) 5 SCC 1 4 (2021) 3 SCC 713

6. The application filed by the appellant herein under Section 439 of the CrPC has been rejected by the learned Special Judge (NIA Act). Section 43D(5) of the UAPA provides that an accused of an offence punishable under the provisions of the UAPA shall not be on bail or on his own bond if the

Court, on a perusal of the case diary or the report made under Section 173 of the Code is of the opinion that there are reasonable grounds for believing that the accusation against such person is prima facie true. Sub-section (6) of Section 43D of the UAPA further provides that the restrictions on granting of bail specified in sub-section (5) is in addition to the restrictions under the Code or any other law for the time being in force on granting of bail. However, the bar provided in Section 43D(5) of the UAPA does not operate against the Constitutional Courts power to ensure fundamental rights guaranteed under Part III of the Constitution of India.

7. Their Lordships of the Supreme Court in the matter of Thwaha Fasal (supra) have held that the restrictions imposed by sub-section (5) of Section 43D per se do not prevent a Constitutional Court from granting bail on the ground of violation of Part III of the Constitution. It was observed as under: "26.While we deal with the issue of grant of bail to the accused nos.1 and 2, we will have also to keep in mind the law laid down by this Court in the case of K.A. Najeeb (supra) holding that the restrictions imposed by sub-section (5) of Section 43D per se do not prevent a Constitutional Court from granting bail on the ground of violation of Part III of the Constitution.

42.As held in the case of K.A. Najeeb (supra), the stringent restrictions imposed by sub-section(5) of Section 43D, do not negate the power of Constitutional Court to grant bail keeping in mind violation of Part III of the Constitution. It is not disputed that the accused no.1 is taking treatment for a psychological disorder. The accused no.1 is a student of law. Moreover, 92 witnesses have been cited by the prosecution. Even assuming that some of the witnesses may be dropped at the time of trial, there is no possibility of the trial being concluded in a reasonable time as even charges have not been framed. There is no minimum punishment prescribed for the offences under Sections 38 and 39 of the 1967 Act and the punishment can extend to 10 years or only fine or with both. Hence, depending upon the evidence on record and after consideration of relevant factors, the accused can be let off even on fine. As regards the offence under Section 13 alleged against accused no.2, the maximum punishment is of imprisonment of 5 years or with fine or with both. The accused no.2 has been in custody for more than 570 days."

8. Apart from this, proviso to Section 43D(5) of the UAPA would be applicable of a person accused of an offence punishable under Chapters V and VI of the UAPA. The appellant has been charged for offences under Sections 10,13, 17, 38(1)(a) and 40 of the UAPA Act.

9. Now the appellant has also been charged under Sections 38 (1) (a) and 40 of the UAPA as the case against the appellant is that he paid levy/extortion money to nexalites for undertaking road construction work in Kanker district. It is the case of the appellant that he has been implicated merely on the basis of confessional statement recorded during the investigation. No incriminating material like money, cloths, wireless sets etc. were recovered from the possession of the present appellant and even if the charge-sheet is taken as it is in its face value along with other material available on record that the appellant was paying extortion money for letting them road construction work smoothly in the said area, no offences under Sections 38 and 40 would be made out. Reliance has been placed in the matter of Sudesh Kedia (supra).

10. In Sudesh Kedia (supra) it has been observed by their Lordships of the Supreme Court that payment of extortion money to a banned/terror organization does not amount to terror funding. It was observed as under:-"13. While considering the grant of bail under Section 43-D(5), it is the bounden duty of the Court to apply its mind to examine the entire material on record for the purpose of satisfying itself, whether a prima facie case is made out against the accused or not. We have gone through the material on record and are satisfied that the Appellant is entitled for bail and that the Special Court and High Court erred in not granting bail to the Appellant for the following reasons:

> 13.1 A close scrutiny of the material placed before the Court would clearly shows that the main accusation against the appellant is that he paid levy/ extortion amount to the terrorist organization.

Payment of extortion money does not amount to terror funding. It is clear from the supplementary charge-sheet and the other material on record that other accused who are members of the terrorist organisation have been systematically collecting extortion amounts from businessmen in Amrapali and Magadh areas. The appellant is carrying on transport business in the area of operation of the organisation. It is alleged in the second supplementary charge-sheet that the appellant paid money to the members of the TPC for smooth running of his business. Prima facie, it cannot be said that the appellant conspired with the other members of the TPC and raised funds to promote the organisation.

13.2 Another factor taken into account by the Special Court and the High Court relates to the allegation of the Appellant meeting the members of the terror organization. It has been held by the High Court that the appellant has been in constant touch with the other accused. The appellant has revealed in his statement recorded under Section 164 CrPC that he was summoned to meet A-14 and the other members of the organisation in connection with the payments made by him. Prima facie, we are not satisfied that a case of conspiracy has been made out at this stage only on the ground that the appellant met the members of the organisation.

13.3 An amount of Rs. 9,95,000/-(Rupees nine lakh and ninety-five thousand only) was seized from the house of the appellant which was accounted for by the appellant who stated that the amount was withdrawn from the bank to pay salaries to his employees and other expenses. We do not agree with the prosecution that the amount is terror fund. At this stage, it cannot be said that the amount seized from the appellant is proceeds from terrorist activity. There is no allegation that the appellant was receiving any money. On the other hand, the appellant is accused of providing money to the members of TPC."

11.Similarly, the Supreme Court in the matter of Thwaha Fasal (supra) has held that mere association with a terrorist organisation as a member or otherwise will not be sufficient to attract the offence under Section 38 unless the association is with intention to further its activities. It was observed as under:-"13. On plain reading of Section 38, the offence punishable therein will be attracted if the accused associates himself or professes to associate himself with a terrorist organisation included in First Schedule with intention to further its activities. In such a case, he

commits an offence relating to membership of a terrorist organisation covered by Section 38. The person committing an offence under Section 38 may be a member of a terrorist organisation or he may not be a member. If the accused is a member of terrorist organisation which indulges in terrorist act covered by Section 15, stringent offence under Section 20 may be attracted. If the accused is associated with a terrorist organisation, the offence punishable under Section 38 relating to membership of a terrorist organisation is attracted only if he associates with terrorist organisation or professes to be associated with a terrorist organisation with intention to further its activities. The association must be with intention to further the activities of a terrorist organisation. The activity has to be in connection with terrorist act as defined in Section 15. Clause (b) of proviso to sub-section (1) of Section 38 provides that if a person charged with the offence under sub-section (1) of Section 38 proves that he has not taken part in the activities of the organisation during the period in which the name of the organisation is included in the First Schedule, the offence relating to the membership of a terrorist organisation under sub-section (1) of Section 38 will not be attracted. The aforesaid clause (b) can be a defence of the accused. However, while considering the prayer for grant of bail, we are not concerned with the defence of the accused.

15.Thus, the offence under sub-section (1) of Section 38 of associating or professing to be associated with the terrorist organisation and the offence relating to supporting a terrorist organisation under Section 39 will not be attracted unless the acts specified in both the Sections are done with intention to further the activities of a terrorist organisation. To that extent, the requirement of mens rea is involved. Thus, mere association with a terrorist organisation as a member or otherwise will not be sufficient to attract the offence under Section 38 unless the association is with intention to further its activities. Even if an accused allegedly supports a terrorist organisation by committing acts referred in clauses (a) to

(c) of sub-section (1) of Section 39, he cannot be held guilty of the offence punishable under Section 39 if it is not established that the acts of support are done with intention to further the activities of a terrorist organisation. Thus, intention to further activities of a terrorist organisation is an essential ingredient of the offences punishable under Sections 38 and 39 of the 1967 Act.

38. Now the question is whether on the basis of the materials forming part of the charge sheet, there are reasonable grounds for believing that accusation of commission of offences under Sections 38 and 39 against the accused nos.1 and 2 is true. As held earlier, mere association with a terrorist organisation is not sufficient to attract Section 38 and mere support given to a terrorist organisation is not sufficient to attract Section 39. The association and the support have to be with intention of furthering the activities of a terrorist organisation. In a given case, such intention can be inferred from the overt acts or acts of active participation of the accused in the activities of a terrorist organization which are borne out from the materials forming a part of charge sheet. At formative young age, the accused nos.1 and 2 might have been fascinated by what is propagated by CPI (Maoist). Therefore, they may be in possession of various documents/books concerning CPI (Maoist) in soft or hard form. Apart from the allegation that certain photographs showing that the accused participated in a protest/gathering organised by an organisation allegedly linked with CPI (Maoist), prima facie there is no material in the charge sheet to project active participation of the accused nos.1 and 2 in the activities of CPI (Maoist) from which even an inference can be drawn that

there was an intention on their part of furthering the activities or terrorist acts of the terrorist organisation. An allegation is made that they were found in the company of the accused no.3 on 30th November, 2019. That itself may not be sufficient to infer the presence of intention. But that is not sufficient at this stage to draw an inference of presence of intention on their part which is an ingredient of Sections 38 and 39 of the 1967 Act. Apart from the fact that overt acts on their part for showing the presence of the required intention or state of mind are not borne out from the charge sheet, prima facie, their constant association or support of the organization for a long period of time is not borne out from the charge sheet.

39. The act of raising funds for the terrorist organisation has been alleged in charge sheet against both the accused. This is a separate offence under Section 40 of the 1967 Act of raising funds for a terrorist organisation which again contains intention to further the activity of terrorist organisation as its necessary ingredient. The offence punishable under Section 40 has not been alleged in this case."

12. It is pertinent to mention here that two co-accused persons namely Hitesh Agrawal and Varun Jain have been granted bail (interim) by their Lordships of the Supreme Court in SLP (Crl.) Nos.8147-8148/2021 by order dated 3.1.2022 by directing as under: "After going through the pleadings, hearing the learned counsel for the parties and considering that the petitioners have been in custody for over 17 months, we deem it appropriate to pass orders directing that the petitioners be granted interim bail on such terms and conditions as may be imposed by the Trial Court as also the conditions (i) the petitioners shall not leave the jurisdiction of the Trial Court without prior leave of the Trial Court; (ii) the petitioners shall surrender their passports, if any; (iii) the Petitioners shall report to the concerned police station at lease twice a week, that is, every Monday and every Friday between 9.30 a.m. to 12.00 Noon, or at any other time as directed by the Officer-in-Charge of the Police Station; and (iv) the Petitioners shall appear in the Trial Court on the dates on which they are required to appear."

13. Reverting to the facts of the present case in the light of aforesaid position, it is quite vivid that main accusation against the appellant is that he was paid levy/extortion money to naxalities for undertaking road construction work in Kanker, whereas in Sudesh Kedia (supra) their Lordships of the Supreme Court have clearly held that payment of extortion money to a banned/terror organization does not amount to terror funding. It is not apparent from the charge-sheet and other documents that the appellant was paying extortion money for letting them work smoothly as no incriminating material in terms of money, cloths, wireless set etc. were recovered from his possession.

14. Considering the fact that two co-accused persons namely Hitesh Agrawal and Varun Jain, who are Directors of M/s Landmark Royal Engineering (India) Private Limited being principal employer of the appellant and the appellant is said to be sub-contractor of them, have been enlarged on bail (interim) by their Lordships of the Supreme Court in SLP (Crl.) Nos.8147-8148/2021 on 3.1.2022 and the appellant is in custody since 23.4.2020 for more than two years and the trial is likely to take time and also considering the nature of evidence available on record with regard to meeting of the appellant with terrorist/banned organization and no objectionable material/cash was recovered

from possession of the appellant, we are of the considered opinion that learned Special Judge (NIA) is absolutely unjustified in rejecting the application for grant of bail. In view of above□stated discussion, reliance placed by learned counsels for the respondent in the matters of Hitesh Agrawal v. State of Chhattisgarh (CRA No.463/2021) and Varun Jain v. State of Chhattisgarh (CRA No.302/2021), decided by this Court on 22.9.2021, are not helpful to the respondent as against the aforesaid orders, SLP (Crl.) Nos.8147□8148/2021 have been entertained by the Supreme Court and Hitesh Agrawal and Varun Jain have been enlarged on interim bail.

15. Accordingly, the impugned order is set□aside and application filed by the appellant under Section 439 of the CrPC is allowed. It is directed that the appellant shall be released on bail on his furnishing a personal bond in the sum of 1,00,000/□with one surety in the like sum to the satisfaction of the concerned Special Judge, for his appearance as and when directed.

16. It is made clear that any observation made in this order is only for the purpose of deciding the application under Section 439 of the CrPC and this Court has not made any observation on the merits of the matter and the Special Judge (NIA Act) will decide the matter strictly as per material available on record without being influenced by any observation made in this order.

Sd/-

(Sanjay K. Agrawal)
Judge

Sd/-

(Rajani Dubey)
Judge

B/-