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## Kerala High Court resumes hearing of Bail Application of M Sivasankar, Former Principal Secretary of Kerala Chief Minister



Sivasankar is presently in ED's custody for alleged involvement in the Kerala Gold Smuggling case. He is also being investigated by the NIA and Customs Department.

Senior Advocate Jaideep Gupta is arguing for Sivasankar.

He denies ED's allegations that Sivasankar contacted customs officials to clear the baggage alleged to be containing smuggled gold.

Gupta claims statement made by co-accused Swapna Suresh about Sivasankar's involvement are not credible as the same were made after her arrest.

Gupta points out that the correspondence between Sivasankar and Swapna does not disclose any knowledge on the latter's part.

He also tells Court that all of Swapna's statements categorically denied his client's involvement in gold smuggling, until before her arrest.

Gupta says the authority has submitted before Special Court that the crime need not be identified to proceed under PMLA

"If you don't identify the crime, how do you know it is a 'Scheduled Offence' under the PMLA from which the proceeds of crime came?": Gupta

Gupta: You cannot proceed against a person on the basis of an underlying offence. What is the predicate offence?

Reads out Section 3 of PMLA:

"There has to be a predicate offence from which proceeds of crime arise, that money needs to be touched by the accused to be prosecuted"

Gupta points out that in this case the predicate offence is not defined. The allegations have been changed from Gold smuggling to involvement in LIFE Mission case.

https://t.co/sDkgKRDwp8

Gupta: First they said proceeds of crime are from gold smuggling. Now they say these are kickbacks from Life Mission contract.

What is the predicate offence? PMLA is not applicable here: Gupta

Where are the proceeds of crime? My client has not received any money, the offence under PMLA is not complete: Gupta

The Project was a private contract, how are they saying that a government servant received kickbacks from it?: Gupta

LIFE Mission project had its own CEO. He was a senior IAS Officer. My client could not have been involved unless they say that the entire Government was under his control. But there is no material to show the same: Gupta

The contract was awarded after a public tender; everything is in public domain; no one can tamper with this information; there are no reasonable grounds to hold my client responsible for anything: Gupta

Gupta is now making submissions on the provision of Bail under Section 45 of PMLA.

Read S. 45 here: https://t.co/Y9emmHQIfa
(This Section was amended in 2018.)

Under S. 45 Public Prosecutor has to be given an opportunity to oppose Bail.

Gupta refers to SC's verdict in Nikesh Tarachand Shah v. UoI where it was held that S. 45 is manifestly arbitrary and contravenes Art 14.

Gupta submits that 2018 amendment has not removed the problem.

Gupta reads out the following excerpt from the Nikesh Tarachand case and submits that many arbitrary conditions pointed out in the Judgment still persist even after the amendment:

↑35. Another conundrum that arises is that, unlike the Terrorist and Disruptive Activities (Prevention) Act, 1987, there is no provision in the 2002 Act which excludes grant of anticipatory bail. Anticipatory bail can be granted in circumstances set out in Siddharam Satlingappa Mhetre v. State of Maharashtra, (2011) 1 SCC 694 (See paragraphs 109, 112 and 117). Thus, anticipatory bail may be granted to a person who is prosecuted for the offence of money laundering together with an offence under Part A of the Schedule, which may last throughout the trial. Obviously for grant of such bail, Section 45 does not need to be satisfied, as only a person arrested under Section 19 of the Act can only be released on bail after satisfying the conditions of Section 45. But insofar as pre-arrest bail is concerned, Section 45 does not apply on its own terms. This, again, would lead to an extremely anomalous situation. If pre- arrest bail is granted to Mr. X, which enures throughout the trial, for an offence under Part A of the Schedule and Section 4 of the 2002 Act, such person will be out on bail without his having satisfied the twin conditions of Section 45. However, if in an identical situation, Mr. Y is prosecuted for the same offences, ↑but happens to be arrested, and then applies for bail, the twin conditions of Section 45 will have first to be met. This again leads to an extremely anomalous situation showing that Section 45 leads to manifestly arbitrary and unjust results and would, therefore, violate Articles 14 and 21 of the Constitution.

Gupta now refers to the second P. Chidambaram Judgment passed by the SC on Dec 4, 2019

Read here:
https://t.co/p8ykH5Z56P

He points out that in cases pertaining to economic offences it has been held that special circumstances must be shown to release the accused on Bail. However in this latest judgment on PMLA, it was held:

21. Thus from cumulative perusal of the judgments cited on either side including the one rendered by the Constitution Bench of this Court, it could be deduced that the basic jurisprudence relating to bail remains the same inasmuch as the grant of bail is the rule and refusal is the exception so as to ensure that the accused has the opportunity of securing fair trial. However, while considering the same the gravity of the offence is an aspect which is required to be kept in view by the Court. The gravity for the said purpose will have to be gathered from the facts and circumstances arising in each case. Keeping in view the consequences that would befall on the society in cases of financial irregularities, it has been held that even economic offences would fall under the category of "grave offence" and in such circumstance while considering the application for bail in such matters, the

Gupta quotes from the Judgment: "...even if allegation is one of grave economic offence, it is not a rule that bail should be denied in every case since there is no such bar created in the relevant enactment passed by the legislature nor does the bail jurisprudence provides so."

Gupta points out that correspondence between Swapna & Sivasankar does not disclose anything suspicious.

Says that they are social acquaintances & merely because Sivasankar sought accommodation for Swapna, Respondents are making an impression that it was to keep proceeds of crime

Gupta reads out a Whatsapp Chat between Sivasankar and one Venugopal. The chat is about availability of a flat.

Gupta: If this is to be read without any external allegations in mind, there is nothing suspicious about it. They are trying to create impressions.

Earlier Gupta had claimed that merely because Sivasankar told Swapna about a job vacancy in PwC for its Space Park Project with Kerala govt. would not mean that there is anything suspicious.

https://t.co/lWadiouGKm

It must be seen that they are socially familiar & this is natural behavior: Gupta tells Kerala HC

Gupta concludes.

Submissions on behalf of ED are likely to be made by ASG Raju on December 18.

Hearing concludes for the day.