

Dr. Menaka Guruswamy

SENIOR ADVOCATE

B.A. L.L.B. (Hons.) N.L.S.I.U., LL.M. (Harvard), B.C.L., D.Phil. (Oxford)

To,
Mr. S.V. Raju
Additional Solicitor General
Union of India

[Subject:

(i) Lawyers Against Malicious Prosecution v. Union of India WP (Crl.) No. 389 of 2021, Order dated 01.10.2021 by the bench comprising of Hon'ble Justice Sanjay Kishan Kaul and Hon'ble Justice MM Sundresh]

(ii) Satender Kumar Antil v Central Bureau of Investigation & Anr. SLP (Crl.) No. 5191 of 2021, Next date of hearing 05.10.2021]

Dear Mr. Raju,

1. The above-captioned matter being WP (Crl.) No. 389 of 2021 was listed before the Hon'ble Supreme Court of India on 01.10.2021 before the bench comprising of Hon'ble Justice Sanjay Kishan Kaul and Hon'ble Justice MM Sundresh. The primary prayer in the Writ Petition was as follows:

“ (i) To frame and lay down principles to the designated special courts, in complaint cases where complaints are filed under Cr.P.C Section 200 & process is issued under Cr.P.C Section 204 wherein the accused were not arrested during investigation by the Investigation Agency which mandates the designated special courts to follow the same principles that this Hon'ble Court proposes to lay down in cases under Cr.P.C Section 170 as per the orders of this Hon'ble Court in Satinder Kumar Antil Vs CBI dated 25.07.2021 and 18.08.2021.”

2. Upon hearing the matter, the Hon'ble Court was pleased to allow the Writ Petition to be withdrawn in terms of the following order on 01.10.2021:

“After arguing for some time learned counsel for the petitioner seeks to withdraw this petition and states that since the larger canvass is being debated before us in SLP(Crl.) No. 5191/2021 and the learned Additional Solicitor General has to assist us, Ms. Maneka Guruswamy, learned senior counsel may be permitted to give her suggestions to the learned Additional Solicitor General in this behalf. The writ petition is dismissed as withdrawn in terms aforesaid with liberty to Ms. Maneka Guruswamy to give her suggestions to learned Additional Solicitor General.” (*emphasis added*)

3. In pursuance of the portion emphasized above, I am writing to you due to the Hon'ble Supreme Court's previous order dated 14.09.2021 in *Satender Kumar Antil v Central Bureau of Investigation & Anr. SLP (Crl.) No. 5191 of 2021*. On 14.09.2021, the Hon'ble Court was pleased to pass the order including the following directions:

“However, in view of the submission in Court, it is deemed appropriate that some guidelines may be laid down so that the Courts are better guided and not troubled with the aspect of bail on charge sheet being filed.

In respect of the aforesaid, Mr. S.V. Raju, learned ASG points out that he will submit certain suggested guidelines after deliberations with Mr. Siddharth Luthra, learned senior counsel and requests for 15 days' time for the said purpose.”

4. I have annexed along with this letter a copy of the Writ Petition being WP (Crl.) No. 389 of 2021 for the purpose of relying upon certain annexed judgements of various Hon'ble High Courts across the country. Several High Courts have recognized and addressed situations where as a matter of routine, trial courts are proceeding to take accused into custody upon the filing of a complaint under Section 200 of the Code of Criminal Procedure ('CrPC') by investigating agencies.

5. This act of requiring the accused to be put in custody is in pursuance of an understanding of the procedure to be followed under Section 204, CrPC which the Petitioner in WP (Crl.) No. 389 of 2021 alleges is erroneous, similarly to the situations sought to be remedied by the Hon'ble Court's remit in SLP (Crl.) No. 5191 of 2021.
6. From the Writ Petition annexed, I seek to draw your attention to the following:
 - a. A copy of the Order dated 07.05.2015 of the Hon'ble Gujarat High Court in Special Criminal Application (Quashing) No. 4922 of 2014. (Annexed as Ann. P-8 in WP (Crl.) No. 389 of 2021, Pg. 142-145)
 - b. A copy of the Order dated 22.05.2017 of the Hon'ble Punjab & Haryana High Court in CRM No. M 14509 of 2019. (Annexed as Annexure P-4 in WP (Crl.) No. 389 of 2021, Pg. 72-75)
7. While other annexed orders in WP (Crl.) No. 389 of 2021 illustrate the issues canvassed by the Petition, the two highlighted above are sufficient to understand how cases arising out of Section 200/204 create similar 'trouble' on the aspect of bail upon complaint being filed, as opposed to the chargesheet.
 - a. In the Order dated 07.05.2015 of the Hon'ble Gujarat High Court in Special Criminal Application (Quashing) No. 4922 of 2014, the Hon'ble High Court notes:
 - i. At Page 134, an earlier order of a coordinate bench of the Hon'ble High Court is recalled wherein the Ld. Trial Court (Designated judge under the PMLA) issued warrant against all accused upon taking cognizance of complaint under Section 200 and the applicant was arrested and remanded to custody. Thereafter the bail application of the applicant was rejected.
 - ii. Further, at Page 139, the coordinate bench of the Hon'ble High Court (Order dated 10.12.2014) records that the applicant therein had cooperated with the investigation

throughout before cognizance was taken by the Ld. Designated judge and the authority concerned had not thought fit to arrest them. Further, the applicants appeared before the Ld. Designated Judge, PMLA Act and also offered surety to no avail. The bench in the Order dated 10.12.2014 issues directions that non-bailable warrants should not be issued unless the court is fully satisfied that the accused is avoiding the process of law.

- iii. Further, on Page 143, the Hon'ble Court notes in relation to the order by the coordinate bench dated 10.12.2014, that:

“In juxtaposition to what was recorded in para 12 of the above order, in a similar case, where the learned ASG appearing on behalf of the Department fairly submitted that the petitioners therein and petitioners herein were called for the purpose of interrogation by the authorities and the authorities thought it fit not to arrest them. However, it transpires that pursuant to execution of non-bailable warrants the petitioners are in jail since 18.01.2014.”

- iv. Similarly, the Order dated 22.05.2017 of the Hon'ble Punjab & Haryana High Court in CRM No. M 14509 of 2019 (at Page 72, 73, 74) showcases a similar situation. The Petitioner therein applies for bail under S. 439, CrPC for offence under Sections 3 read with Section 4 of the PMLA. The Learned Special Judge, CBI, Punjab summoned all accused on 05.09.2016 upon taking cognizance of complaint, on 26.07.2016. The Petitioner surrendered before the Ld. Court and filed application for regular bail. The bail application was rejected on 09.01.2017 'in view of the provisions of Section 45 of the Act.'
- v. On page 74, the Hon'ble High Court notes:

“Keeping in view the law laid by the Hon'ble Division Benches of this Court, I find that these cited judgments fully apply to the facts of the present case as in the case in hand, admittedly, the accused has surrendered on the basis of the summons issued against him and he was never arrested by the E.D. Under Section 19 of the Act. Furthermore, in the main case, which was got registered by the CBI, the present petitioner is already on bail.”

8. The situations mentioned above merit the consideration of the need for judicial guidelines which extend to cases under Section 200/204 of the CrPC wherein specialized investigation agencies approach special courts under Acts such as the PMLA to take cognizance of the Act.
9. The following issues related to the scheme of the PMLA and the situation of the accused upon the court taking cognizance, need to be considered:
 - a. Prior to cognizance being taken by the Ld. Trial Court, the accused does not have the right to participate in the proceedings. In case the accused fully cooperates with the investigation by the investigating authorities, the investigating agencies do not deem it fit to conduct arrest under Section 19 of the PMLA. The conduct of the accused inhibits the right of the accused to seek anticipatory bail, as no apprehension of arrest is made out while investigation carries on for a long period of time. The accused remains unaware of the date when the trial court will take cognizance of the case under Section 200, CrPC.
 - b. The powers of arrest in the PMLA available to investigating authorities are severely limited due to the scheme of the Act. Section 19 of the PMLA imposes a very strict burden upon the investigating agency, requiring ‘reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of an offence punishable under this Act’ before arrest can be effected. Further, the powers are further limited due to the operation of Section 62 of the Act which allows for a punishment of

up to two years for any authority or officer which 'detains or searches or arrests any person' without reasons recorded in writing.

- c. Further, after the judgement of the Hon'ble Supreme Court in Nimesh Tarachand Shah v. Union of India (2018) 11 SCC 1 which held that Section 45 of the PMLA is manifestly arbitrary insofar as it imposes twin conditions being (i) the satisfaction of the court that there are reasonable grounds for believing that the accused is not guilty of such offence and (ii) that the accused is not likely to commit any offence while on bail.

10. It is therefore brought to your kind attention that the legislative scheme of the act, as well as the decision of the investigating authorities to not arrest individuals cooperating with the investigating authorities are regularly superseded by a supposedly erroneous understanding of the mandate of the court under Section 204, CrPC. The accused, similarly to the Petitioner in Satender Kumar Antil v Central Bureau of Investigation & Anr. SLP (Crl.) No. 5191/2021, are thereafter left with no recourse but to apply for bail and appeal despite no reasons being provided or being required to be provided under the scheme of the CrPC for taking them into custody in the first place.

11. Therefore, your attention is sought to include within the remit of the exercise in Satender Kumar Antil v Central Bureau of Investigation & Anr. SLP (Crl.) No. 5191/2021, the situation of accused routinely taken into custody due to the arbitrary exercise of powers under Section 204, CrPC.

12. Please find annexed (in email):

1. (Order) Lawyers Against Malicious Prosecution v. Union of India WP (Crl.) No. 389 of 2021, Order dated 01.10.2021 by the bench comprising of Hon'ble Justice Sanjay Kishan Kaul and Hon'ble Justice MM Sundresh.

2. (Writ Petition) Lawyers Against Malicious Prosecution v. Union of India WP (Crl.) No. 389 of 2021.



Dr. Menaka Guruswamy

Dr. Menaka Guruswamy

Senior Advocate

Supreme Court of India

Copy to:

1. Mr. Siddharth Luthra, Sr. Adv., Ld. Senior Counsel for the Petitioner in *Satender Kumar Antil v Central Bureau of Investigation & Anr. SLP (Crl.) No. 5191 of 2021*, requesting his able guidance.
2. Court-master, Court Room No. 6, Hon'ble Supreme Court of India, In SLP (Crl.) No. 5191 of 2021 (Listed at Item No. 6 on 05.10.2021.)