

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

BAIL APPLN. 4295/2021

Reserved on : 10.02.2022

Date of Decision : 02.03.2022

IN THE MATTER OF:

RAJ SINGH GEHLOT

..... Petitioner

Through: Dr. A.M. Singhvi and Mr. Mukul Gupta,
Senior Advocates with Mr. Sandeep
Kapur, Mr. Vijay Aggarwal, Mr.
Tanveer A. Mir, Mr. Vir Sandhu, Ms.
Niharika Karanjawala, Mr. Mridul
Yadav, Mr. Aashneet Singh, Mr. Mudit
Jain, Mr. Mridul Yadav, Mr. Aashneet
Singh, Mr. Avishkar Singhvi and Mr.
Sahil Modi, Advocates.

Versus

DIRECTORATE OF ENFORCEMENT

..... Respondent

Through: Mr. Zoheb Hossain, Spl. Counsel for
ED with Mr. Vivek Gurnani, Advocate.

CORAM:

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI
(VIA VIDEO CONFERENCING)**

J U D G M E N T

MANOJ KUMAR OHRI, J.

1. The present application has been filed under Section 439 Cr.P.C. on behalf of the applicant seeking regular bail in Complaint Case No.39/2021 filed under Sections 44/45 of the Prevention of Money Laundering Act, 2002 (hereinafter,

referred to as the '*PMLA* ') and arising out of ECIR No. 14/STF/2019 registered under Sections 3/4 PMLA by the respondent/ED.

Factual Background

2. Briefly stated, the facts of the case are that one *M/s Aman Hospitality Pvt. Ltd.* (hereinafter, referred to as '*AHPL* '), a group entity of Ambience Group which was founded by the applicant, purchased a plot of commercial land at Shahdara in an open auction held by the DDA on 03.03.2006 for the purpose of construction and development of a hotel. Upon technical evaluation, the cost of the hotel project was estimated as Rs.867 crores, in which promoters' contribution was fixed @ Rs.287 crores and Term loan @ Rs.580 crores. Based on this estimate, AHPL approached J&K Bank, Ansal Plaza Branch through the applicant, with a proposal dated 12.03.2009 for sanction of loan of Rs.75 crores and BG facility of Rs.15 crores towards financial closure.

Later, the development strategy was changed and it was decided that a luxury hotel would be constructed instead of two hotels of lower categories. The step having resulted in cost escalation, the feasibility of the project, the cost and the source of finance were re-assessed by *PNB Investment Services Ltd.*, and the loan amount was worked out @ Rs.810 crores and promoter's contribution was fixed @ Rs.462 crores. The total project cost was estimated as Rs.1272 crores. In due course, a Term loan of Rs.810 crores was sanctioned and disbursed in favor of AHPL by a consortium of banks, led by J&K Bank. When the company turned defaulter, the consortium of banks sanctioned a funded interest term loan of Rs.165.82 crores to restructure its loan. AHPL still failed to discharge its obligations, and as a result, J&K Bank declared the company's loan account NPA on 30.06.2018.

3. On the basis of source report verification, FIR No. 15/2019 dated 24.07.2019 was registered by Anti-Corruption Bureau (ACB), J&K against the applicant and others, for commission of offence punishable under Section 120B of the Ranbir Penal Code, 1989 (hereinafter, referred to as '*RPC*') and Section 5(1)(d) read with Section 5(2) of the Jammu & Kashmir Prevention of Corruption Act Samvat, 2006 (hereinafter, referred to as '*J&K PC Act*'). On 20.03.2021, charge sheet No. 1 was filed against the applicant, AHPL, *M/s Ambience Pvt. Ltd.* (hereinafter, referred to as '*APL*') and others, under Section 120B read with Sections 409/420 RPC and Sections 5(1)(c)/5(1)(d) read with Section 5(2) of the J&K PC Act, for misappropriation and diversion of funds from the loan of Rs.100 crores sanctioned by J&K Bank. The applicant was not arrested and the charge sheet was filed without arrest. Vide order dated 29.11.2021 passed by the learned Addl. Special Judge, Anti-Corruption Srinagar, the applicant was formally admitted to regular bail in the scheduled offence.

The Prosecution Complaint

4. On 18.10.2019, the ECIR in question came to be registered against the applicant and others under Sections 3/4 PMLA. During investigation, it was revealed that out of the Term loan of Rs.810 crores, Rs.781 crores were routed by the accused through Escrow Account No. CD *** (i.e. 0408010*****) maintained with J&K Bank, Ansal Plaza Branch, Delhi, in which the loan amount was disbursed. The payments were made to various entities, including 25 non-contracting parties (21 companies and 4 individuals), who were not connected with the project in any manner and did not provide any service or goods in furtherance of its implementation.

5. The amounts received by the 25 non-contracting parties were transferred to one *M/s Raj Commercials and Agencies* and one *M/s M&N Commercials*, which

companies further transferred the funds to Ambience Group companies, wherefore the money was used to settle loans of Ambience Group companies and for meeting expenses of the applicant, his family and his friends.

6. The applicant joined investigation between 31.07.2020 and 28.07.2021. On 28.07.2021, he was arrested in the present case and remained in custody of the respondent till 07.08.2021. Thereafter, he was remanded to judicial custody. His first application seeking regular bail was dismissed by the Sessions Court on 10.09.2021, subsequent to which the prosecution complaint came to be filed on 24.09.2021. The applicant preferred another bail application, urging that the filing of the complaint by the respondent constituted a material change in circumstance. However, his second bail application was also dismissed by the Sessions Court on 27.10.2021.

Proceedings before the Special Court

7. Vide order dated 10.09.2021, passed in respect of the first bail application of the applicant, it was noted by the Special Court that in January 2018, the applicant/accused had attempted to settle the total outstanding liability of about Rs.783.96 crores towards the principal amount for a paltry sum of Rs.286.95 crores and the same showed his intent to embezzle public money. It was further observed that the applicant, a qualified Chartered Accountant, was an influential person owing to his financial status and professional expertise and the crucial witnesses, being his acquaintances or relatives, he would certainly attempt to influence the fair course of investigation. In consideration of the nature of the allegations and the investigation, the possibility of his attempting to influence the course of investigation, and the legal position that economic offences are to be treated as a class apart, the relief of bail was denied to the applicant.

8. The second bail application preferred on behalf of the applicant came up before the Special Court on 27.10.2021, when note was taken of two changes in circumstance since the dismissal of the earlier bail application of the applicant – first, that the applicant was represented by a different counsel, and second, that the prosecution complaint had been filed by the ED. While the first change was not cited by the applicant, the second change was held by the Court to not constitute any material change in circumstance. Considering the nature of the offence, the seriousness of allegations and a strong possibility of the applicant/accused attempting to influence the course of trial by influencing witnesses and tampering with evidence, the relief of bail was denied.

Contentions raised on behalf of the Applicant

9. Dr. A.M. Singhvi, learned Senior Counsel appearing on behalf of the applicant, raised the following contentions:-

(A) AHPL had engaged APL on turnkey basis to obtain permissions/clearances/approvals from various authorities and to further undertake construction/development/completion of the aforesaid hotel project. Prior to the sanction of the Term loan, i.e., up till 31.03.2009, APL invested an amount of Rs.267.33 crores towards the project, using its own funds as well as funds raised from Ambience Group. The said funds were to be '*reimbursed*' by means of the payments received from AHPL in terms of the turnkey contract, after the loan was disbursed to it. Thus, the allegations of siphoning off of funds to the tune of Rs.781 crores are baseless.

(B) It has been alleged that funds from the Term loan were diverted to 25 non-contracting parties, but the allegation is misleading, as after disbursement of the Term loan, funds were transferred from the Escrow Account, on instructions of the turnkey contractor, to entities who had given financial assistance to AHPL/APL

for the construction of the hotel. Besides, the loan was disbursed over a long period of time and lenders, engineers visited the site time and again to inspect the progress of the project.

It has further been alleged that funds were siphoned off for making FDs and for diversion of materials to other projects, and the same constituted '*proceeds of crime*', but the averment to the effect is also misplaced. The terms and conditions of the loan sanctioned to AHPL required the company to first invest equivalent/higher amount in the project and only then the loan amounts were to be disbursed. Accordingly, even prior to the disbursal of the loan amount, the promoters had invested Rs.267.33 crores, which fact was duly acknowledged at the time of sanction. Thereafter, the amount sanctioned to AHPL was utilized in the construction of the hotel, which has 480 rooms with 10 lacs square feet covering area with 30,000 square feet banquet area, and is completely functional since its inauguration. The completion of the hotel project and its being completely functional indicate that there has been no diversion of funds, and least of all, any generation of '*proceeds of crime*'.

(C) The hotel project at Shahdara was independently got valued by the banks and the reports concerned pegged the value of the hotel @ Rs.1150-1200 crores. In this regard, reliance was placed on 04 different valuation reports, wherein the project was valued between Rs.1206.38 crores to Rs.1381 crores.

(D) In 2019, two forensic audits were conducted on the directions of banks. Neither report makes any mention of misappropriation or diversion of funds, or records any adverse finding against the applicant or AHPL. Moreover, not one bank out of the consortium of 8 banks has filed any complaint, either against the applicant or against AHPL, alleging any fraud or cheating in sanction or disbursal of the Term loan.

(E) The applicant had agreed to a one-time settlement (OTS) offer for Rs.470 crores as base price as per Swiss Challenge Method and the Bank had issued OTS Letter dated 10.02.2021, but the OTS was not followed through. Besides, adequate security was available with the banks, in pursuance of which, 51% of shareholding worth about Rs.666.13 crores was transferred in their favor, converting debt into equity. As on 09.01.2018, the loan outstanding of the member banks was Rs.286.96 crores.

(F) The investment of Rs.1204 crores in the construction and development of the hotel project is not disputed by the respondent, as apparent from the counter-affidavit filed on its behalf. Further, the hotel at Shahdara is operational since 2012 and an occupancy certificate has also been issued in respect thereof.

(G) The investigation by the ED is not focusing on the Bank loans alone. ED's case is that the promoters' contribution was siphoned off and the Term loan was not used '*directly*'. The averment with respect to the promoter's contribution is logically flawed, as the same can never be '*siphoned off*'. Besides, if the allegations of siphoning off are to be believed, the hotel could never have been constructed.

(H) The submission made on behalf of the respondent that the Term loan was obtained on the basis of expired sanction letters is erroneous, as the only sanction letter that had expired was with respect to TFCI, which had not taken any loan.

(I) The second bail application preferred by the applicant was dismissed by the Sessions Court on the ground that there was no change in circumstance but the dismissal was erroneous, inasmuch as after dismissal of the first bail application, the ED had filed the prosecution complaint and the same constituted a material change in circumstance.

(J) Establishing of an offence under PMLA involves three tests - the commission of an act, the said act resulting in proceeds of crime, and the projection of the proceeds of crime as untainted. These core ingredients being cumulative, conjunctive and consequential in nature, and the respondent having failed to show generation of any '*proceeds of crime*' as defined under Section 2(1)(u) PMLA, offence under Section 3 PMLA is not made out. As a necessary corollary, the burden of proof would have fallen on the applicant only if the allegations had been established or had any basis.

(K) Economic offences cannot be classified separately in matters of bail. In fact, it is the length of the punishment that should form a guiding factor.

(L) The charge sheet in the scheduled offence, which entails punishment upto life imprisonment, came to be filed before the concerned Court without seeking arrest of the applicant. Thus, there is no reason for the applicant to be kept languishing in jail in the PMLA offence, in which the maximum sentence that may be awarded is of 07 years.

(M) So far as the triple test for grant of bail is concerned, it was submitted that the applicant, being a Chartered Accountant with vast business interests, has deep roots in the society. From 31.07.2020 to 30.09.2020, he joined investigation 07 times, and thereafter, he was not called for more than 10 months. He again joined investigation on 19.07.2021 and 28.07.2021. On said occasions, the applicant also cooperated by providing all the information sought. As his passport has already been seized by ACB, Srinagar, it cannot be said that the applicant is a flight risk.

It was urged that considering the facts that the entire evidence, which is documentary in nature, has been seized, that the statements of the witnesses have been recorded, and that the complaint has already been filed, there is no possibility of the applicant tampering with evidence or influencing witnesses. It was also

averred that since the applicant satisfies the triple test for grant of bail, the seriousness of the offence is not a factor that shall preclude the Court from granting bail.

(N) The applicant, who is a 62-year-old man, was arrested on 28.07.2021 and since then he has been in custody. The investigation in the case is complete, inasmuch as the complaint was filed on 24.09.2021, and the applicant is no longer required for any investigation.

Besides, Section 44 PMLA provides the procedure for trying of both the PMLA offence as well as the predicate offence by the Special Court. As such, the trial is likely to take a long time considering there are 28 accused persons and the investigation is stated to be pending in the predicate offence. It was stressed that the prosecution has cited nearly 35 witnesses and the documents run into 6201 pages. While placing reliance on the decision in State of Kerala v. Raneef reported as **(2011) 1 SCC 784**, it was urged that the applicant may not be subjected to further pre-trial incarceration.

(O) In support of his submissions, learned Senior Counsel placed reliance on the decisions in Sanjay Chandra v. Central Bureau of Investigation reported as **(2012) 1 SCC 40**, P. Chidambaram v. Directorate of Enforcement reported as **(2020) 13 SCC 791**, Tunde Gbaja v. Central Bureau of Investigation reported as **2007 SCC OnLine Del 450**, Babu Singh and Others v. State of U.P. reported as **(1978) 1 SCC 579**, Laxman Irappa Hatti and another v. State of Maharashtra reported as **2004 SCC OnLine Bom 599**, Mahima v. State of Maharashtra reported as **2015 SCC OnLine Bom 6161**, Sri Mohammed Nalpad Haris v. State of Karnataka by Cubbon Park Police Station reported as **2018 SCC OnLine Kar 1034**, Mohan Raikwar v. State of M.P. reported as **1999 SCC OnLine MP 104**, Gayatri Devi v. State & Ors. reported as **2011 SCC OnLine Del 4061**, Nisha Arya

v. The State (NCT of Delhi) reported as **2016 SCC OnLine Del 4533**, Mrs. Shivani Rajiv Saxena v. Directorate of Enforcement & Anr. reported as **2017 SCC OnLine Del 10452**, Munawar v. State of Maharashtra and Others reported as **(2021) 3 SCC 712**, H.B. Chaturvedi v. C.B.I. reported as **2010 SCC OnLine Del 2155**, Directorate of Enforcement v. Gagan Dhawan reported as **2019 SCC OnLine Del 9521**, Awanish Kumar Mishra v. State reported as **2021 SCC OnLine Del 4786**, Suresh Kalmadi v. CBI reported as **2012 SCC OnLine Del 361**, Mahesh Kumar & Ors v. Central Bureau of Investigation reported as **2013 SCC OnLine Del 3903**, Raneef (Supra), Shameet Mukherjee v. State reported as **2003 SCC OnLine Del 821**, K. Narayana Rao v. CBI, **BAIL APPLN. 1432/2009**, Ashok Kumar Gupta v. State reported as **2007 SCC OnLine Del 893**, Ratnakar Manikrao Gutte v. The State of Maharashtra, **SLP(Crl.) No. 9554/2019**, Rakesh Kumar Paul v. State of Assam reported as **(2017) 15 SCC 67**, State v. Hargyan reported as **2016 SCC OnLine Del 3730**, Manish Gandhi v. State of Madhya Pradesh through Police Station ATS/STF, Bhopal (M.P.), **M.Cr.C. No. 15397/2017**, Court on its own motion v. Central Bureau of Investigation reported as **2004 SCC OnLine Del 53**, Aman Preet Singh v. C.B.I. through Director reported as **2021 SCC OnLine SC 941**, R. Vasudevan v. CBI, New Delhi reported as **2010 SCC OnLine Del 130**, Ravi Singhal v. Union of India and Another reported as **1993 SCC OnLine Del 274**, Firoz Khan v. State (NCT of Delhi) reported as **2020 SCC OnLine Del 1694**, Sushil Ansal v. Central Bureau of Investigation & Anr reported as **1997 SCC OnLine Del 629**, Ankit Agarwal v. Directorate of Enforcement reported as **2021 SCC OnLine Del 4820**, Anil Mahajan v. Commissioner of Customs & Anr. reported as **2000 SCC OnLine Del 119**, Shri Gurbaksh Singh Sibbia and Others v. State of Punjab reported as **(1980) 2 SCC 565**, Jitender Kumar v. Govt. of NCT of Delhi reported as **2016 SCC OnLine Del 1170**, Paras Mal Lodha v. Assistant Director, Directorate of

Enforcement reported as **2017 SCC OnLine Del 8676**, Preeti Gupta and Another v. State of Jharkhand and Another reported as **(2010) 7 SCC 667**, Gaurav Gupta v. Director of Enforcement reported as **2015 SCC OnLine Del 9929**, Rakesh Manekchand Kothari v. Union of India & 2 reported as **2015 SCC OnLine Guj 6256**, Suresh @ Bubby v. State, **BAIL APPLN. 699/2011**, Parvez Akhtar v. State (NCT of Delhi) reported as **2006 SCC OnLine Del 1084**, Brahm Singh v. State (N.C.T. of Delhi) reported as **2009 SCC OnLine Del 3792**, Amar Singh v. State & Ors. reported as **2011 SCC OnLine Del 4522**, Santosh s/o Dwarkadas Fafat v. State of Maharashtra reported as **(2017) 9 SCC 714** and Ishwar Singh v. State (Delhi Admn.) & Another reported as **1993 SCC OnLine Del 244**.

(P) With regard to Section 45 PMLA, it was submitted that the twin conditions set out in sub-clause (1), having been struck down in Nikesh Tarachand Shah v. Union of India and Another reported as **(2018) 11 SCC 1**, are not applicable to the present case. In this regard, reference was made to sub-clause (e) of Clause 205 of the Finance Bill, 2018, which reads as under :-

“(e) in section 45, in sub-section (1), —

(i) for the words “punishable for a term of imprisonment of more than three years under Part A of the Schedule”, the words “under this Act” shall be substituted;

(ii) in the proviso, after the words “sick and infirm,”, the words “or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees” shall be inserted;”

It was urged that by virtue of the Finance Act, 2018, the only amendment made in Section 45(1) PMLA is that the term “*punishable for a term of imprisonment of more than three years under Part A of the Schedule*” has been substituted with the term “*under this Act*” and the same does not result in revival of the twin conditions.

(Q) Reliance was placed on the decisions in Sameer Magan Bhujbal v. Assistant Director, Directorate of Enforcement and Others reported as **2019 SCC OnLine Bom 7574**, Dr. Vinod Bhandari v. Asstt. Director reported as **2018 SCC OnLine MP 1559**, Okram Ibobi Singh v. Directorate of Enforcement with its Headquarter at New Delhi through the Director of Enforcement reported as **2020 SCC OnLine Mani 365**, Upendra Rai v. Directorate of Enforcement reported as **(2017) 9 SCC 714**, D.K. Shivakumar v. Directorate of Enforcement reported as **2019 SCC OnLine Del 10691**, Babu Lal Agrawal v. Enforcement Directorate Through- I.O., Enforcement Directorate (FEMA/ PMLA), Raipur., MCRC No.78/2021, Sai Chandrashekhar v. Directorate of Enforcement reported as **2021 SCC OnLine Del 1081**, Deepak Virendra Kochhar v. Directorate of Enforcement and Another, Criminal Bail Application No. 1322/2020, Amarendradhari Singh v. Directorate of Enforcement reported as **2021 SCC OnLine Del 3901**, Union of India, Through, Directorate of Enforcement v. Yogesh Narayanrao Deshmukh and Another reported as **2021 SCC OnLine Bom 2905**, Jyoti Prakash Jay Prakash v. Union of India (E.D.), **ABLAPL No. 15091/2019**, Satender Kumar Antil v. Central Bureau of Investigation and Another reported as **2021 SCC OnLine 922**, Pradeep Kumar Sethy v. Enforcement Directorate, Government of India reported as **2021 SCC OnLine Ori 2307** to submit that since the passing of the judgment in Nikesh Tarachand Shah (Supra), various High Courts have held that the twin conditions contained in Section 45(1) PMLA do not stand revived by virtue of the amendment made in 2018.

(R) Reference was made to the decisions in M/s Ujagar Prints and Others (II) v. Union of India and Others reported as **(1989) 3 SCC 488** and Indian Aluminium Co. and Others v. State of Kerala and Others reported as **(1996) 7 SCC 637** to submit that an amendment cannot validate a law which was previously declared invalid without remedying the infirmities that led to its invalidation.

(S) Reliance was placed on Shri Prithvi Cotton Mills Ltd. and Another v. Broach Borough Municipality and Others reported as **1969 (2) SCC 283** and Madan Mohan Pathak and Another v. Union of India and Others reported as **1978 (2) SCC 50** to submit that nullification of judicial order cannot be done by legislative amendment. Learned Senior Counsel also placed reliance on the decisions of various High Courts in this regard and pressed that there is no revival by implication.

10. Mr. Mukul Gupta, learned Senior Counsel appearing for the applicant, additionally submitted that as per the charge sheet filed by ACB, Srinagar, it was noted at the time of conducting of Techno Economic Viability study by *PNB Gilts Ltd.* that the applicant had already spent Rs.267.33 crores upto 31.03.2009 towards the twin hotel project, out of which Rs.189.76 crores were spent on land and site development and Rs.65.78 crores were spent on cost of building and furnishing, Furniture and interior, P&M, Fixed Assets etc. He further drew attention of the Court to the complaint filed in the present case, wherein it has been stated that an amount of Rs.267.33 crores has been spent by the applicant from his own pocket and Rs.593 crores have been contributed by the applicant's family and friends.

Reference was made by the learned Senior Counsel to the recent decision of the Punjab and Haryana High Court in Sukhpal Singh Khaira v. Assistant Director, Enforcement Directorate, CRM-M No. 51885/2021.

Contentions made on behalf of the respondent/ED

11. Per contra, Mr. Zoheb Hossain, learned Special Counsel appearing for the respondent, vehemently opposed the bail application and made the following submissions:-

(A) AHPL, a private limited company of which the applicant is the promoter/Director, took a loan of Rs.810 crores and Bank Guarantee facility of Rs.60 crores from a consortium of banks, led by J&K Bank, in respect of the project in question. The company also availed working capital of Rs.3 crores from *Punjab & Sind Bank*.

(B) Initially, Term loan of Rs.580 crores, alongwith BG facility of Rs.60 crores, was sanctioned by the banks for which debt-equity ratio of 2:1 was agreed upon. However subsequently, the company changed the development strategy of the project and instead of two hotels under lower categories, it decided to develop one five-star Deluxe Hotel. Upon change in the scope of the project, revised financial closure was worked out at Term loan of Rs.810 crores and BG facility of Rs.60 crores. An Escrow Account was opened with J&K Bank Ltd., Ansal Plaza Branch for disbursal of this loan and for making of payments towards construction and development of the hotel.

(C) In due course, the Term loan was disbursed to the accused, but without adhering to the *pro-rata* mechanism mentioned in the sanction letter. The funds received were siphoned off by the accused for purposes other than sanctioned, to the benefit of the applicant and his relatives and friends, either directly or indirectly. The siphoning off of the loan amount was done from the stated Escrow Account, as evident from the complaint. The applicant was the authorized signatory for documentation in respect of the sanction of loans from banks and in connection with the Escrow Account.

(D) Out of the sanctioned loan, Rs.718 crores were routed through the Escrow Account to different parties, in complete violation of the terms and conditions stipulated in the sanction letter. In his representation dated 15.09.2020 addressed to the respondent, it was admitted by the applicant that Rs.486.9 crores were

transferred from the Escrow Account to 25 non-contracting parties without any bill/invoice being raised by them. The applicant was also the '*Introducer*' as well as the '*Authorised Signatory*' in most of these parties, which had not provided any services or goods whatsoever for the hotel project. During the investigation, the non-contracting parties produced only generic receipts towards payment received and failed to produce any corresponding invoices/bills.

(E) The amounts received by the 25 non-contracting parties were further transferred to two entities, namely *M/s Raj Commercials and Agencies* and *M/s M&N Commercials*. Almost all of the aforesaid 25 non-contracting parties as well as the two entities were controlled by the applicant, as the directors/owners/individuals therein were either his relatives or employees of the Ambience Group companies.

The amounts received by the two entities were again transferred to the credit of other companies of Ambience Group, and ultimately diverted for purposes other than implementation of the hotel project, such as for settling loans of Ambience Group companies and for making fixed deposits. Till date, Rs.155.29 crores have been detected as having been diverted.

(F) Investigation has revealed that besides diversion of money, the accused also engaged in diversion of materials to other project sites of Ambience Group. As the payments towards said materials were recorded in the expenses book of AHPL for its hotel project at Shahdara, the diversion amounted to generation of '*proceeds of crime*' as defined under Section 2(1)(u) read with Section 3(1)(v) PMLA.

With respect to the allegation of diversion of materials, reliance was placed on the statements recorded under Section 50 PMLA of vendors, including *M/s JK Cement Ltd.*, *M/s JK Lakshmi Cement*, *M/s Shree Cement Ltd.*, *M/s KL Rathi Steel*,

M/s RGTL Industries Ltd., M/s Shri Rathi Steel Ltd., M/s Rathi Steel and Power Ltd., M/s Sudhir Gensets Ltd., M/s Lord Krishna Ispat Trading Co., M/s DS Gupta Construction Pvt. Ltd., M/s Taneja Vidyut Control Pvt. Ltd., M/s Schneider Electric India Pvt. Ltd. and M/s Voltas Limited.

(G) The submission that promoters' contribution @ Rs.462 crores was only the initially decided amount, and not the actual amount, is misleading. As per the terms and conditions of the loan sanction orders, promoters' contribution @ Rs.462 crores was to be routed through the Escrow Account. However, the promoters did not bring the said contribution through the Escrow Account. In view of the lapse, promoters' contribution has deliberately not been accounted for in the calculation of cost of construction on behalf of the applicant. During investigation, AHPL has also not cooperated in providing details of exact contribution of the promoters. Accordingly, investigation is pending in this regard.

(H) AHPL's initial loan proposal to J&K Bank dated 12.03.2009 for sanction of Rs.75 crores, alongwith BG facility of Rs.15 crores, was rejected by the then Branch Head *Ms. Rajni Saraf*, while giving detailed reasons. However, the said Officer was mischievously transferred from Delhi to Srinagar and within two weeks of her transfer, an enhanced loan of Rs.100 crores was sanctioned to AHPL by connivance of the Bank officials, without referring to the earlier rejection note. In this regard, it was also mentioned that the then Branch Head *Sh. Rakesh Kumar Karyal* and then Manager Advances *Sh. Kuldeep Kumar Gupta* are also arrayed as accused.

(I) The cost of project mentioned in the complaint as Rs.1204.79 crores is not a finding of the investigation, but rather a reproduction of the statement given by the applicant during investigation.

(J) With respect to Section 45 PMLA, it was submitted that the twin conditions under sub-clause (1), which were held unconstitutional in Nikesh Tarachand Shah (Supra), have been revived by the amendment made vide the Finance Act, 2018.

Reference was made to the judgment dated 28.01.2022 passed in Ajay Kumar v. Directorate of Enforcement, **Criminal Application (BA) No. 1149/2021**, where a Division Bench of the Bombay High Court, while answering a reference in respect of Section 45 PMLA post the decision in Nikesh Tarachand Shah (Supra) and the amendment made in the provision by virtue of Finance Act, 2018, has held:-

“49. ...Undoubtedly, the Legislature has power and competence to amend the provisions of the Act. Unless the amended provision is struck down by the Courts, it cannot be watered down. Since after the amendment the entire complexion of section 45 has been changed, we are not in agreement with the contention that the entire section has to be re-enacted by way of amendment after decision in the case of Nikesh Shah (Supra). Therefore, in our opinion, the twin conditions would revive and operate by virtue of Amendment Act, which is on date in force. In view of that, we answer the reference by stating that the twin conditions in section 45(1) of the 2002 Act, which was declared unconstitutional by the judgment of the Apex Court in Nikesh T.Shah Vs. Union of India (2018) 11 SCC 1, stand revived in view of the Legislative intervention vide Amendment Act 13 of 2018.”

It was also urged that placing of reliance on various Single-Bench decisions of the High Courts in connection with the issue is of no use to the applicant, considering the decision rendered by a Division Bench in Ajay Kumar (Supra) and the recent decisions of the Supreme Court in The Directorate of Enforcement v. Parkash Gurbaxani etc., **SLP(Crl.) 7666-7667/2021** and The Asst. Director Enforcement Directorate v. Dr. V.C. Mohan, **Criminal Appeal No. 21/2022**.

(K) Economic offences constitute a class apart and bail should not be ordinarily granted in such cases. In this regard, reliance was placed on the decision in Rohit Tandon v. Directorate of Enforcement reported as **(2018) 11 SCC 46**.

(L) The authorized officer, on the basis of the material in his possession and after having reason to believe that the applicant was guilty of an offence punishable under PMLA, arrested him in terms of Section 19 of the Act. Later, the applicant's bail application was rightly rejected by the Sessions Court, as there was no change in circumstance since dismissal of his first bail application. In this regard, reliance was placed on the decisions in Virupakshappa Gouda and Another v. State of Karnataka and Another reported as **(2017) 5 SCC 406** and Kalyan Chandra Sarkar v. Rajesh Ranjan alias Pappu Yadav and Another reported as **(2005) 2 SCC 42**.

(M) Considering the seriousness and high magnitude of the offence, the period of incarceration in jail should not be a governing factor in the present case. In this regard, reliance was placed on the decision in State of Bihar and Another v. Amit Kumar alias Bachcha Rai reported as **(2017) 13 SCC 751**.

(N) The applicant is the main conspirator, who as on 25.09.2019, alongwith *Aman Gahlot* and *Dayanand Singh*, was the Director in AHPL. Though he has joined the investigation, being a qualified CA, he has not cooperated in the same and not divulged the complete facts which are in his exclusive knowledge. As further investigation is pending, bail ought not to be granted to the applicant.

12. In rebuttal, Dr. A.M. Singhvi, learned Senior Counsel appearing for the applicant, submitted that the twin conditions do not stand revived by the decision in Dr. V.C. Mohan (Supra), as the order was passed on the facts of the case and in the context of anticipatory bail. It was also contended that pendency of further

investigation should not prevent the Court from exercising its jurisdiction to grant bail.

In response to the averment that *Ms. Rajni Saraf*, ex-Branch Head of J&K Bank, Ansal Plaza Branch, was mischievously transferred, learned Senior Counsel submitted that no evidence has been placed on record to show that the applicant was in any way connected with said transfer. In fact, the transfer took place in routine manner. Thereafter, the enhanced sum was sanctioned in favor of AHPL because it had achieved financial closure and the project had progressed manifold. In this regard, he also placed reliance on the statement recorded under Section 50 PMLA of *Sh. Yasaduq Ahmad Dar*, Vice President (C&CB Department), Corporate Headquarters, Srinagar, who stated that both loan proposals, one submitted by *Ms. Rajni Saraf* and the other by *Sh. Rakesh Karyal*, were processed by him and in connection therewith, there was no pressure.

13. I have heard learned counsels for the parties at length and have also gone through the written submissions as well as the rejoinder submissions which have been placed on record on their behalf.

Analysis

14. Article 21 of the Constitution of India guarantees a right to personal liberty to every person, and thus, there is no gainsaying that bail is the rule and jail an exception. Before proceeding to analyze the facts of the present case and bearing this principle in mind, I deem it expedient to first recapitulate the position of law on the issue of grant of bail, in cases involving economic offences and otherwise.

15. In Moti Ram v. State of Madhya Pradesh reported as **1978 (4) SCC 47**, while issuing a note of caution in respect of adverse consequences pre-trial incarceration, the Supreme Court had observed thus:-

“14. The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

16. Subsequently, in Ram Govind Upadhyay v. Sudarshan Singh and Others reported as **(2002) 3 SCC 598**, certain considerations that may be borne in mind by Courts while determining the question of bail were illustrated by the Supreme Court in the following terms:-

“4. Apart from the above, certain other which may be attributed to be relevant considerations may also be noticed at this juncture, though however, the same are only illustrative and not exhaustive, neither there can be any. The considerations being:

(a) While granting bail the court has to keep in mind not only the nature of the accusations, but the severity of the punishment, if the accusation entails a conviction and the nature of evidence in support of the accusations.

(b) Reasonable apprehensions of the witnesses being tampered with or the apprehension of there being a threat for the complainant should also weigh with the court in the matter of grant of bail.

(c) While it is not expected to have the entire evidence establishing the guilt of the accused beyond reasonable doubt but there ought always to be a prima facie satisfaction of the court in support of the charge.

(d) Frivolity in prosecution should always be considered and it is only the element of genuineness that shall have to be considered in the matter of grant of bail, and in the event of there being some doubt as to the genuineness of the prosecution, in the normal course of events, the accused is entitled to an order of bail.”

17. In Masroor v. State of Uttar Pradesh and Another reported as **(2009) 14 SCC 286**, it was noted that while deciding the question of bail, Courts must strike a balance between the interest of the society in general and the right of an accused

to personal liberty. While stressing on the importance of achieving said balance, the Supreme Court held:-

“15. There is no denying the fact that the liberty of an individual is precious and is to be zealously protected by the courts. Nonetheless, such a protection cannot be absolute in every situation. The valuable right of liberty of an individual and the interest of the society in general has to be balanced. Liberty of a person accused of an offence would depend upon the exigencies of the case. It is possible that in a given situation, the collective interest of the community may outweigh the right of personal liberty of the individual concerned. In this context, the following observations of this Court in Shahzad Hasan Khan v. Ishtiaq Hasan Khan are quite apposite : (SCC p. 691, para 6)

“6. ... Liberty is to be secured through process of law, which is administered keeping in mind the interests of the accused, the near and dear of the victim who lost his life and who feel helpless and believe that there is no justice in the world as also the collective interest of the community so that parties do not lose faith in the institution and indulge in private retribution.”

18. In Prasanta Kumar Sarkar v. Ashis Chatterjee and Another reported as (2010) 14 SCC 496, while relying on State of U.P. through CBI v. Amarmani Tripathi reported as (2005) 8 SCC 21, Prahlad Singh Bhati v. NCT, Delhi and Another reported as (2001) 4 SCC 280 and Ram Govind Upadhyay (Supra), factors to be considered while deciding a bail application were again enunciated by the Supreme Court, as follows:-

“9. ...It is well settled that, among other circumstances, the factors to be borne in mind while considering an application for bail are:

(i) whether there is any prima facie or reasonable ground to believe that the accused had committed the offence;

(ii) nature and gravity of the accusation;

(iii) severity of the punishment in the event of conviction;

(iv) danger of the accused absconding or fleeing, if released on bail;

- (v) character, behaviour, means, position and standing of the accused;
- (vi) likelihood of the offence being repeated;
- (vii) reasonable apprehension of the witnesses being influenced; and
- (viii) danger, of course, of justice being thwarted by grant of bail.”

19. Time and again, it has been opined by Courts across the country that bail is the rule and jail an exception. Besides reiterating this view, the Supreme Court in Sanjay Chandra (Supra) has further laid down that both factors, i.e. severity of the punishment and gravity of the offence, have to be simultaneously weighed while determining whether or not to grant bail to an accused. Relevant excerpt from the decision is extracted hereunder:-

“21. In bail applications, generally, it has been laid down from the earliest times that the object of bail is to secure the appearance of the accused person at his trial by reasonable amount of bail. The object of bail is neither punitive nor preventative. Deprivation of liberty must be considered a punishment, unless it can be required to ensure that an accused person will stand his trial when called upon. The courts owe more than verbal respect to the principle that punishment begins after conviction, and that every man is deemed to be innocent until duly tried and duly found guilty.

22. From the earliest times, it was appreciated that detention in custody pending completion of trial could be a cause of great hardship. From time to time, necessity demands that some unconvicted persons should be held in custody pending trial to secure their attendance at the trial but in such cases, “necessity” is the operative test. In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter, upon which, he has not been convicted or that in any circumstances, he should be deprived of his liberty upon only the belief that he will tamper with the witnesses if left at liberty, save in the most extraordinary circumstances.

23. Apart from the question of prevention being the object of refusal of bail, one must not lose sight of the fact that any imprisonment before conviction has a substantial punitive content and it would be improper

for any court to refuse bail as a mark of disapproval of former conduct whether the accused has been convicted for it or not or to refuse bail to an unconvicted person for the purpose of giving him a taste of imprisonment as a lesson.

24. In the instant case, we have already noticed that the "pointing finger of accusation" against the appellants is "the seriousness of the charge". The offences alleged are economic offences which have resulted in loss to the State exchequer. Though, they contend that there is a possibility of the appellants tampering with the witnesses, they have not placed any material in support of the allegation. In our view, seriousness of the charge is, no doubt, one of the relevant considerations while considering bail applications but that is not the only test or the factor : the other factor that also requires to be taken note of is the punishment that could be imposed after trial and conviction, both under the Penal Code and the Prevention of Corruption Act. Otherwise, if the former is the only test, we would not be balancing the constitutional rights but rather "recalibrating the scales of justice".

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37. The principles, which the Court must consider while granting or declining bail, have been culled out by this Court in *Prahlad Singh Bhati v. NCT, Delhi* thus : (SCC pp. 284-85, para 8)

"8. The jurisdiction to grant bail has to be exercised on the basis of well-settled principles having regard to the circumstances of each case and not in an arbitrary manner. While granting the bail, the court has to keep in mind the nature of accusations, the nature of [the] evidence in support thereof, the severity of the punishment which conviction will entail, the character, behaviour, means and standing 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 or State and similar other considerations. It has also to be kept in mind that for the purposes of granting the bail the legislature has used the words 'reasonable grounds for believing' instead of 'the evidence' which means the court dealing with the grant of bail can only satisfy it (sic itself) as to whether there is a genuine case against the accused and that the prosecution will be able to produce prima facie evidence in support of

the charge. It is not expected, at this stage, to have the evidence establishing the guilt of the accused beyond reasonable doubt."

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45. In Bihar Fodder Scam (Laloo Prasad case) this Court, taking into consideration the seriousness of the charges alleged and the maximum sentence of imprisonment that could be imposed including the fact that the appellants were in jail for a period of more than six months as on the date of passing of the order, was of the view that the further detention of the appellants as pretrial prisoners would not serve any purpose.

46. We are conscious of the fact that the accused are charged with economic offences of huge magnitude. We are also conscious of the fact that the offences alleged, if proved, may jeopardise the economy of the country. At the same time, we cannot lose sight of the fact that the investigating agency has already completed investigation and the charge-sheet is already filed before the Special Judge, CBI, New Delhi."

20. The considerations and parameters relevant to grant of bail have been restated by the Supreme Court in Y.S. Jagan Mohan Reddy (Supra), while taking special note of cases involving economic offences, in the following manner:-

"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.

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."

21. In P. Chidambaram (Supra), it was held by the Supreme Court that even though gravity of the offence is an important factor for determining whether or not to grant bail, and economic offences of the nature involved in the case were *prima facie* grave, it is not a rule that bail shall inevitably be denied. No case may be seen as setting a precedent with respect to grant/rejection of bail, except on principle, and it will be for the Court concerned to determine the gravity of the charged offence in each case based on the facts and circumstances. Further, the gravity of the offence is a factor which is in addition to the triple test/tripod test. Relevant excerpt from the decision is extracted below:-

“22. The learned Senior Counsel for the appellant has also placed reliance on the decision on the decision in Sanjay Chandra v. CBI...

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The said case was a case of financial irregularities and in the said circumstance this Court in addition to taking note of the deep-rooted planning in causing huge financial loss, the scope of consideration relating to bail has been taken into consideration in the background of the term of sentence being seven years if convicted and in that regard it has been held that in determining the grant or otherwise of bail, the seriousness of the charge and severity of the punishment should be taken into consideration.

23. ...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 Court will have to deal with the same, being sensitive to the nature of allegation made against the accused. One of the circumstances to consider the gravity of the offence is also the term of sentence that is prescribed for

the offence the accused is alleged to have committed. Such consideration with regard to the gravity of offence is a factor which is in addition to the triple test or the tripod test that would be normally applied. In that regard what is also to be kept in perspective is that even if the 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 provide so. Therefore, the underlining conclusion is that irrespective of the nature and gravity of charge, the precedent of another case alone will not be the basis for either grant or refusal of bail though it may have a bearing on principle. But ultimately the consideration will have to be on case-to-case basis on the facts involved therein and securing the presence of the accused to stand trial.”

22. From a reading of the judicial dicta cited hereinabove, it is discernible that in matters of regular bail under Section 439 Cr.P.C., a Court must consider aspects, including but not limited to, the larger interest of the State or public, whether the accused is a flight risk, whether there is likelihood of his tampering with evidence, whether there is likelihood of his influencing witnesses, etc. Apart from these, another factor relevant to the question of bail would be the gravity of the alleged offence and/or nature of the allegations levelled, which may serve as an additional test and can be applied while keeping in view the severity of the punishment that the offence entails.

23. It is equally well-settled that economic offences constitute a class apart and need to be visited with a different approach, given their severity and magnitude. Albeit these offences are likely to adversely impact the economic fabric of the country, bail shall not be denied to a person accused of an economic offence in a routine manner. Each case must be adjudged on the basis of the peculiar facts and circumstances, while striking a balance between the right to personal liberty of the accused and the interest of the society in general.

24. During the course of arguments, an issue regarding applicability of Section 45(1) PMLA was raised on behalf of the parties. In connection therewith, I shall advert at the very outset to the provision, as it stood prior to the amendment in 2018:-

“45. Offences to be cognizable and non-bailable.—(1)
[Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—]

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(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 :

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm, may be released on bail, if the Special Court so directs :

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.

25. A plain reading of the provision would show that the embargo imposed by Section 45(1) PMLA on grant of bail took form of twin conditions – (i) that the Public Prosecutor shall be given an opportunity to oppose the application for release, and (ii) where the Public Prosecutor opposes such application, the Court should be satisfied that there are reasonable grounds for believing that the accused

is not guilty of the offence and that he is not likely to commit any offence while on bail. The limitations so imposed were in addition to those imposed under Cr.P.C. and had an overriding effect over the provisions of the Code, in case there occurred any inconsistency between the provisions of the two. Though stringent, they were held by the Supreme Court to be mandatory.

26. In Gautam Kundu v. Directorate of Enforcement (Prevention of Money-Laundering Act), Government of India through Manoj Kumar, Assistant Director, Eastern Region reported as **(2015) 16 SCC 1**, while dismissing an appeal filed against the order of the High Court rejecting bail application of the appellant, the Supreme Court analyzed the sweep of Section 45 PMLA and held:-

“30. The conditions specified under Section 45 of PMLA are mandatory and needs to be complied with, which is further strengthened by the provisions of Section 65 and also Section 71 of PMLA. ...PMLA has an overriding effect and the provisions of CrPC would apply only if they are not inconsistent with the provisions of this Act. Therefore, the conditions enumerated in Section 45 of PMLA will have to be complied with even in respect of an application for bail made under Section 439 of CrPC. That coupled with the provisions of Section 24 provides that unless the contrary is proved, the authority or the Court shall presume that proceeds of crime are involved in money-laundering and the burden to prove that the proceeds of crime are not involved, lies on the appellant.

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34. ...We have noted that Section 45 of PMLA will have overriding effect on the general provisions of the Code of Criminal Procedure in case of conflict between them. As mentioned earlier, Section 45 of PMLA imposes two conditions for grant of bail, specified under the said Act. ...Therefore, there is no doubt that the conditions laid down under Section 45-A of PMLA, would bind the High Court as the provisions of special law having overriding effect on the provisions of Section 439 of the Code of Criminal Procedure for grant of bail to any person accused of committing offence punishable under Section 4 of

PMLA, even when the application for bail is considered under Section 439 of the Code of Criminal Procedure.”

27. Later, while relying on the decision in Gautam Kundu (Supra), the Supreme Court, in Rohit Tandon (Supra), observed thus:-

“18. ...The other observations in the said order will have no bearing on the merits of the controversy and required to be reckoned whilst considering the prayer for grant of regular bail. For that, the appellant must succeed in overcoming the threshold of the rigors of Section 45 of the 2002 Act... Suffice it to observe that indulgence shown to the appellant in terms of order dated 10-8-2017 will be of no avail. In that, the facts such as the appellant never tried to evade the investigation or that he has suffered incarceration for over 7½ months or that the charge-sheet has been filed in the predicate offence registered under FIR No. 205/2016 or the factum of illness of the mother of the appellant or the observation that no definite reason has been assigned by the respondents for substantiating the allegation that the appellant would tamper with the evidence, may become relevant only if the threshold stipulation envisaged under Section 45 of the 2002 Act was to be fulfilled...”

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21. The consistent view taken by this Court is that 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. Further, when attempt is made to project the proceeds of crime as untainted money and also that the allegations may not ultimately be established, but having been made, the burden of proof that the monies were not the proceeds of crime and were not, therefore, tainted shifts on the accused persons under Section 24 of the 2002 Act.”

28. Be that as it may, in 2017, the constitutional validity of Section 45 PMLA came to be challenged before the Supreme Court in Nikesh Tarachand Shah (Supra), wherefore, by a judgment rendered in 2018, explicating the defects inherent in the provision and the challenges posed thereby, the Supreme Court held that the twin conditions imposed by Section 45(1) PMLA were manifestly

arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India.

29. Post the decision in Nikesh Tarachand Shah (Supra), an amendment was made to Section 45 PMLA vide the Finance Act, 2018 and brought into effect from 19.04.2018. The new Section 45(1) PMLA reads as follows:-

“45. Offences to be cognizable and non-bailable.—(1)
[Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence [under this Act] shall be released on bail or on his own bond unless—]

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release; and

(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 :

Provided that a person, who, is under the age of sixteen years, or is a woman or is sick or infirm [or is accused either on his own or along with other co-accused of money-laundering a sum of less than one crore rupees], may be released on bail, if the Special Court so directs:

Provided further that the Special Court shall not take cognizance of any offence punishable under Section 4 except upon a complaint in writing made by—

(i) the Director; or

(ii) any officer of the Central Government or a State Government authorised in writing in this behalf by the Central Government by a general or special order made in this behalf by that Government.”

30. Dr. Singhvi, learned Senior Counsel for the applicant, while placing reliance on the decisions of different High Courts, had submitted that the amendment made to Section 45 PMLA in 2018 does not revive the twin conditions set out in sub-clause (1). Learned Special Counsel for the respondent, on the other

hand, had placed reliance on the views expressed in certain other decisions of High Courts, where discordant notes were sounded.

31. During the course of submissions, learned counsels for the parties had also informed that the issue relating to constitutional validity of the amendment made in Section 45 PMLA vide the Finance Act, 2018 as well as revival of the twin conditions thereby, alongwith other issues relating to PMLA, has already been taken up for hearing by the Supreme Court and is under active consideration.

32. At this stage, this Court deems it apposite to advert to the two recent decisions by the Supreme Court in The Directorate of Enforcement v. Parkash Gurbaxani etc., **SLP(Crl.) 7666-7667/2021** and Dr. V.C. Mohan (Supra), which are briefly discussed hereunder.

33. By way of the impugned order in Parkash Gurbaxani (Supra), passed in the context of grant of regular bail, the Punjab and Haryana High Court had held that the twin conditions under Section 45(1) PMLA do not stand revived by virtue of the amendment made by the Finance Act, 2018. Vide order dated 20.10.2021, the Supreme Court observed as under :-

“...We are in agreement with his grievance that the High Court has not dealt with the mandatory twin requirements but has granted indulgence to the respondent(s) on extraneous consideration.”

Although the Supreme Court declined to interfere with the impugned order in the circumstances of the case, including the fact that the respondent(s) were reportedly senior citizens and had cooperated in the investigation, it was directed that the same shall not be treated as precedent in other cases. The question of law, however, was left open.

34. In Dr. V.C. Mohan (Supra), on a challenge made by the Directorate of Enforcement to the grant of anticipatory bail to the respondent, the Supreme Court

set aside the impugned order and remanded the matter back for re-consideration.

It was held as under:-

“This appeal takes exception to the judgment and order dated 25.06.2021 passed by the High Court of Telangana at Hyderabad in Criminal Petition No. 4134 of 2021, whereby the High Court granted anticipatory bail to the respondent in connection with offence concerning the Prevention of Money Laundering Act (for short 'PMLA Act') being F.No. ECIR/HYZO/20/2019/2246 bearing summons dated 11.05.2021.

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Indeed, the offence under the PMLA Act is dependent on the predicate offence which would be under ordinary law, including provisions of Indian Penal Code. That does not mean that while considering the prayer for grant of anticipatory bail in connection with PMLA offence, the mandate of Section 45 of the PMLA Act would not come into play.

Mr. Dama Seshadri Naidu, learned senior counsel appearing for the respondent invited our attention to the dictum in paragraph 42 of the judgment in Nikesh Tarachand Shah vs. Union of India & Anr. reported in (2018) 11 SCC 1. The observations made therein have been misunderstood by the respondent. It is one thing to say that Section 45 of the PMLA Act to offences under the ordinary law would not get attracted but once the prayer for anticipatory bail is made in connection with offence under the PMLA Act, the underlying principles and rigors of Section 45 of the PMLA Act must get triggered — although the application is under Section 438 of Code of Criminal Procedure. As aforesaid, the High Court has not touched upon this aspect at all.

It is urged before us by the respondent that this objection was never taken before the High Court as it is not reflected from the impugned judgment. It is not a question of taking objection but the duty of court to examine the jurisdictional facts including the mandate of Section 45 of the PMLA Act, which must be kept in mind.

Accordingly, we deem it appropriate to set aside the impugned judgment and order and relegate the parties before the High Court for reconsideration of Criminal Petition No. 4134 of 2021 afresh for grant

of anticipatory bail filed under Section 438 of the Code of Criminal Procedure in connection with stated PMLA offence.”

Notably, the above observations came to be made by the Supreme Court after granting leave in an SLP and conversion of the case into a Criminal Appeal. In consideration of the same, this Court is of the opinion that the reliance placed on the decision in Sukhpal Singh Khaira (Supra) is of no help to the applicant.

35. At this stage, this Court deems it apposite to refer to the observations made in Rohit Tandon (Supra), where while relying on its earlier decisions in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and Another reported as **(2005) 5 SCC 294** and State of Maharashtra v. Vishwanath Maranna Shetty reported as **(2012) 10 SCC 561**, the Supreme Court outlined the parameters for adjudication of bail application in terms of Section 45(1)(ii) PMLA and held as under:

“22. It is not necessary to multiply the authorities on the sweep of Section 45 of the 2002 Act which, as aforementioned, is no more res integra. The decision in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra and State of Maharashtra v. Vishwanath Maranna Shetty dealt with an analogous provision in the Maharashtra Control of Organised Crime Act, 1999. It has been expounded that the Court at the stage of considering the application for grant of bail, shall consider the question from the angle as to whether the accused was possessed of the requisite mens rea. The Court is not required to record a positive finding that the accused had not committed an offence under the Act. The Court ought to maintain a delicate balance between a judgment of acquittal and conviction and an order granting bail much before commencement of trial. The duty of the Court at this stage is not to weigh the evidence meticulously but to arrive at a finding on the basis of broad probabilities. Further, the Court is required to record a finding as to the possibility of the accused committing a crime which is an offence under the Act after grant of bail.”

36. Coming to the present case, it is noted that the applicant is a qualified Chartered Accountant, having deep roots in the society. He was not arrested in the

scheduled offence and the charge sheet came to be filed without arrest. Thereafter, he was formally admitted to regular bail in the scheduled offence and his passport has already been seized by the ACB, Srinagar. The applicant has also admittedly joined investigation on a number of occasions. The evidence in the case is primarily documentary in nature, which has been seized. Under these circumstances, this Court is of the opinion that the applicant is not a flight risk and fears, if any, of his fleeing from justice can be allayed by imposing conditions and taking measures such as issuance of LOCs, etc.

The statements of the witnesses having been recorded under Section 50 PMLA and the documents relevant to the investigation having been collected, the apprehensions regarding the applicant influencing witnesses and/or tampering with evidence are unfounded. The respondent has also failed to point out any instance of influencing of witnesses/tampering with evidence by the applicant during the investigation. In this backdrop, this Court is of the view that the applicant satisfies the triple test for grant of bail.

37. Though it has been urged on behalf of the respondent that further investigation in the case is pending, it is observed that an accused cannot be kept languishing in jail for long, undetermined periods, only on the ground that investigation is stated to be pending [Refer: P. Chidambaram v. Central Bureau of Investigation reported as **(2020) 13 SCC 337**].

38. At the same time however, based on the categorical observations made by the Supreme Court in Dr. V.C. Mohan (Supra) and Parkash Gurbaxani (Supra), this Court reckons that the present bail application needs to be tested on the touchstone of the twin conditions set out in Section 45(1) PMLA as well.

39. As per the prosecution complaint, in total, Term loan of Rs.810 crores was availed by AHPL and sanctioned by the consortium of banks. The funds were

disbursed through an Escrow Account maintained with J&K Bank, Ansal Plaza Branch.

40. The FIR was registered against the applicant, AHPL and others on the allegation that the Term loan taken from J&K Bank was misappropriated and the funds were siphoned off. Subsequently, the ECIR in question was recorded in relation to commission of offence under Sections 3/4 PMLA. It has been alleged that the sole purpose for which the Term loan was sanctioned was the implementation of AHPL's hotel at Shahdara. But the funds obtained thereunder were put to other uses, for the direct/indirect benefit of the accused. In this regard, attention was drawn to '*other terms and conditions*' of sanction of Rs.100 crores to AHPL, which included:-

“(iv) The company to undertake that funds will not be utilised for any purpose other than for implementation of the project.”

41. As per the prosecution complaint, out of Rs.810 crores, an amount of Rs.781 crores was routed through the Escrow Account. It is also stated that while a sum of Rs.156.5 crores was transferred to APL, Rs.66 crores were transferred to AHPL. Further, Rs.445.5 crores were transferred to 21 entities and Rs.49 crores to 4 individuals, who were non-contracting parties having no connection with the hotel project. On receipt of payments, said parties transferred an amount of Rs.461 crores (93 percent of the received amount) to *M/s Raj Commercial and Agencies* and *M/s M&N Commercial*. While *M/s Raj Commercial and Agencies* was the HUF concern of the applicant, *M/s M&N Commercial* was the HUF concern of *Late Sh. Nakul Gehlot* (nephew of the applicant). Both the entities were controlled by the applicant. It has come in the investigation that the amounts received by *M/s Raj Commercial and Agencies* and *M/s M&N Commercial* were further diverted to Ambience Group companies, which ultimately utilized the funds to settle unrelated loans and to make fixed deposits.

42. In the investigation conducted so far, Rs.113.73 crores have been detected to have been diverted and used for purposes such as settling of outstanding loan and overdraft liabilities of other companies and projects, tax payments, making of FDs, salary and cash withdrawals for expenses of other Group companies.

43. In addition to the above, Rs.41.56 crores out of the Term loan have been detected as having been utilized to purchase materials for the other projects of Group companies, such as – for project site of shopping mall of *M/s Apex Homes Pvt. Ltd.*; for project site of *M/s Ambience Tower Pvt. Ltd.* at Rohini and Shalimar Bagh in Delhi; for project site of *M/s Ambience Project Pvt. Ltd.* at Ambience Island, Nathupur, Gurgaon; for *Caitrona* project site in Gurgaon and for *Ambience Mall, Vasant Kunj*.

In this regard, reliance was placed on the statements of 13 vendors recorded under Section 50 PMLA. One of the vendors, namely *M/s JK Cement Ltd.*, has stated that Rs.3.99 crores in total were paid by AHPL and APL to the company in the name of the hotel project at Shahdara. Out of the said sum, Rs.1.01 crores (approx.) were paid for supplying cement material to AHPL for the hotel project at Shahdara, but the remaining payment of Rs.2.44 crores was made for supply of cement material to the project site of APL at *Ambience Islands, NH-8, Gurgaon*. The other vendors have also given statements on similar lines.

It has been urged that in this way, funds from the Term loan were siphoned off, resulting in generation of '*proceeds of crime*' as well as their layering and ultimate projection as untainted money.

44. It has also come in the investigation that the obligatory contribution of Rs.462 crores was not made by the promoters, thereby violating the loan conditions. Further, the loan amount disbursed by the Bank was siphoned off through certain entities, which have been found to exist only on papers.

45. Besides, the applicant has been stated to be the Authorized Signatory not only for AHPL, but also in respect of all documentation done towards sanction of the Term loan as well as in the Escrow Account in which the Term loan was disbursed and from which funds are alleged to have been diverted. Moreover, the forensic report stated that all payments towards construction of the hotel were not made through the Escrow Account.

46. Notably, the lender banks did not take recourse under SARFAESI Act and chose to opt initially for an OTS, as the action, even if successful, would have led to recovery only of the debt portion, and not the part of the debt that the banks were constrained to convert into equity under the SDR scheme of RBI. As on date, 51% shareholding in AHPL, worth Rs.666.13 crores, is stated to have been transferred to the banks to convert part of the debt into equity. Though the applicant has claimed leniency in view of the same, this Court is of the opinion that conversion of a part of the debt into equity, pursuant to the SDR scheme, was an outcome of the criminal misuse of the loan amount by the applicant and the same does not wipe off the criminality relating to the underlying transaction, whereby public money under the garb of loan was diverted and siphoned off.

47. Considering the parameters of Section 45(1) PMLA, I find no reasonable ground for believing that the applicant is not guilty of the alleged offence. From a *prima facie* view of the material placed on record and in light of the gravity of the alleged offences, it cannot be said either that the applicant is not likely to commit any such offence while on bail. Accordingly, the bail application is dismissed.

48. Needless to state, nothing stated hereinabove shall amount to an expression on the merits of the case and shall not have a bearing on the trial of the case.

(MANOJ KUMAR OHRI)
JUDGE

MARCH 02, 2022
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