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

+ **Date of Decision: 19.07.2016**

% **BAIL APPLN. 1491/2015**

DR.RAJESH J.AEREN

..... Applicant
Through: Mr. V.K. Ohri, Senior Advocate
along with Mr. Aman Sareen &
Mr.Gurmehar S. Sistani, Advocates.

versus

STATE OF NCT OF DELHI

..... Respondent
Through: Mr. Rajat Katyal, APP for the State.

Ms. Rebecca John, Senior Advocate
along with Mr. Vivek Kohli &
Mr.Vishnu Anand, Advocates for the
complainant.

Mr. Shri Krishan & Mr. Neeraj,
Advocates for the complainant.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. The applicant Dr. Rajesh Aeren has preferred the present application u/s 438 Cr PC for grant of anticipatory bail apprehending arrest in case FIR No.0006/2015 registered on the complaint of Deepak Kumar and Bharat

Bhushan Kumar at PS EOW, Mandir Marg, New Delhi under section 406/420 read with section 120B IPC. The said complaint pertained to the investment made by the complainant in a real estate development company of the applicant, viz. Aeren Entertainment Zone Pvt. Ltd. (AEZPL). AESPL was undertaking development of an integrated mall in the name “Festival City Mall” on the outskirts of Ludhiana City in the State of Punjab (hereinafter referred to as the project). The complainants entered into 23 agreements to sell on 30.07.2008 for purchase of 13 shops on the ground floor and 10 shops on the first floor. The bail application preferred by the applicant was dismissed by the learned ASJ on 30.05.2015.

2. The applicant states that he is the Vice Chairman of a group company, namely, M/s Aeren R Enterprises Pvt. Ltd. He claims that the said company has a reputation in the real estate field, and that the applicant belongs to a respectable family of Delhi. He claims to be involved in the real estate business for generations and that he has deep roots in the society and has clean antecedents. He has been conferred a doctorate degree, i.e. a Ph.D. He claims to be a member of reputed societies such as Rotary, Red Cross, Khushi etc.

3. The applicant claims that he has been falsely implicated in the case, and is a victim of conspiracy hatched by the complainants with one of the shareholder partner of the applicant, namely, Mondon Investment Ltd. (Mondon). He claims that the FIR has been registered at the instance of the complainants as an arm twisting and blackmailing method to extort money and to convert a civil dispute into a criminal one. The complainants have already initiated civil proceeding in relation to their investment in the year

2009, and that the complaint/FIR has been got registered to harass the applicant.

4. He submits that the company petition for winding up of Aeren Enterprises Pvt. Ltd. is pending, apart from a civil suit for recovery, declaration, permanent and mandatory injunction being C.S.(O.S.) No.1220/2001 in this Court in relation to the transactions between the applicant and the complainants. The applicant further submits that he joined the investigation on several dates, i.e. 24.02.2015, 27.02.2015, 03.03.2015 and filed a detailed reply to the questionnaire before the Investigating Officer (I.O.) submitting all the documents running into more than 300 pages. Thus, he is not required for custodial interrogation, as no document are required to be seized as the entire dispute is based on documentary evidence, which is already in the possession of I.O.

5. The learned ASJ dismissed the bail application of the applicant after taking note of the submissions of the applicant and after summarizing the transactions in question. The operative part of the said order reads as follows:

“17. Admittedly, the applicant is not in India and NBWs have been issued against him twice. Although he has moved an anticipatory bail application through the counsel. But, the fact remains that despite joining the investigation, he had not informed the investigating officer of his intention to leave the country. The facts of the case clearly makes out the case that the complainant were allured and induced investment in a different project then the earlier one with assurance of return and also delineating the specific unit for them making them to believe that the property fully belongs to the applicant. Whereas, the property already mortgaged to the banks and the

process had started by the banks. For one default, the bank loan was restructured in other words only means that there was a default and the bank in order to minimize the loss, the loan restructure the same to avoid the same from becoming non performing assets.

18. Keeping in view the nature of allegation, seriousness of allegation where huge money is defrauded of many people and its magnitude and the applicant/ accused is absconding at present. Therefore, in totality of the facts and circumstances of the case, I am of the opinion that the applicant is not entitled to anticipatory bail. Accordingly, the anticipatory bail application stands dismissed’.

6. This application has been pending since 28.07.2015. The applicant was not granted any protection in the present proceedings till 06.11.2015. On 06.11.2015, the Court took note of the submissions of the applicant that he is currently in Dubai and shall return to Delhi on 18.11.2015 in order to submit to the jurisdiction of this Court. The Court directed the applicant to surrender his passport before the I.O. in the subject FIR immediately upon arrival, and file an undertaking before this Court that he shall not leave the country without prior permission of the Court. The Court observed that subject to the undertaking being filed by the applicant, no coercive steps be taken against him till the next date of hearing. Since then, the applicant has been enjoying the interim order passed by the Court.

7. The order sheet shows that prior to the passing of the order dated 06.11.2015, and even thereafter, the applicant sought to make proposals for amicable settlement/ liquidation of assets. At request of the parties, the Court appointed Ms. Justice Rekha Sharma, a retired Judge of this Court as a

mediator with the consent of parties, so as to assist them in arriving at an amicable settlement of all their outstanding disputes.

8. The applicant sought permission to travel to Dubai by moving Crl. M.A. No.2123/2016. This application was allowed on 05.02.2016 subject to, inter alia, the condition that he shall appear before the learned Mediator with a concrete proposal for settlement of all the disputes that have led to the registration of the subject FIR. On 26.05.2016, it was informed to the Court by the counsel for the applicant that a concrete proposal for settlement had been given. A copy of the same was purportedly placed on record.

9. Today, it has been informed that the company AEZPL has gone into liquidation. The report of the learned Mediator has also been referred to. The learned Mediator records that on 05.03.2016, counsel for the applicant herein sought time to submit a revival scheme. On 19.03.2016, counsel for the applicant submitted that since the said company had been wound up by the High Court, as such the proposal for revival filed before the Company Court was withdrawn. However, he submitted that the applicant shall furnish a fresh revival scheme on behalf of the applicant in his individual capacity. Despite the objections raised by the complainants/ investors, an opportunity was granted to the applicant to submit a fresh revival scheme in his individual capacity. The matter was adjourned before the learned Mediator and was taken up on 07.05.2016. Once again, there was no proposal for revival or for settlement of the claims of the complainants and other investors placed before the learned Mediator. Consequently, the learned Mediator sent the report dated 19.05.2016 to the Court.

10. The submission of Mr. Ohri, learned senior counsel for the petitioner is that the complainants Deepak Kumar and Bharat Bhushan Kumar had invested in the project with open eyes. They were not strangers to the applicant, and had past dealings with the applicant. The amounts found due to the complainants under an arbitral award dated 26.07.2008 were sought to be invested in the project as it appeared to be a lucrative investment proposition. A foreign investor had already entered into a MoU with AEZPL and the banks had also agreed to grant a loan for a sum of Rs.100 crores for the development of the project. Several leading retail chains of the country had also entered into a MoU with AEZPL to book space in the mall to be developed under the project. When the agreements were entered into, the complainants were aware that AEZPL had taken term loans from a consortium of banks comprising of Allahabad Bank, Bank of Rajasthan and Indian Overseas Bank.

11. Mr. Ohri submits that the mere inability to make repayment of the investment made by the complainants cannot lead to criminality. The reason for non-repayment of the investment of the complainants is stated to be the default of the foreign collaborator Mondon, as they suddenly stopped remitting instalments and did not remit the amount of 38.30 crores to AEZPL. On account of the said default, AEZPL had to approach the consortium of banks for rescheduling the term loan vide proposal dated 05.01.2009. Before the said proposal was approved by Allahabad Bank, at the instance of Mondon, the account of AEZPL was declared NPA and the proceedings under The Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002 (SARFAESI Act) were initiated.

12. Mr. Ohri submits that even after the passing of the order dated 06.11.2015, whenever the applicant has been called for investigation, he joined the investigation and also provided answers to the queries raised by the I.O. The applicant has also provided a host of documents to the I.O. to substantiate his answers given to the queries raised by the I.O. Mr. Ohri submits that the entire transaction is documented and there is no necessity for custodial interrogation of the applicant. He submits that the applicant is ready and willing to join the investigation in future as well and answer all the queries that the I.O. may have.

13. Mr. Ohri submits that merely because the amounts involved are large— as the project is a very large project, is no ground to require the applicant to surrender and face custodial interrogation. There is no criminality in the conduct of the applicant as an office bearer of AEZPL. The mere breach of contract, assuming there is one – between the company AEZPL and the complainants, would not give rise to a criminal action against the applicant who was acting as an officer of AEZPL. He submits that the complainants have completely concealed the past dealings between the complainants and other entities of the applicant, and the fact that they had only invested the amount found due to them in an arbitral award dated 26.07.2008, into the project.

14. Mr. Ohri places reliance on *Siddharam Satlingappa Mhetre v. State of Maharashtra & Ors.*, (2011) 1 SCC 694, wherein the parameters to be

considered while dealing with an anticipatory bail application have been set out. He also places reliance on *Sumit Mehta v. State*, (2013) 15 SCC 570. He submits that the applicant has clean antecedents and the FIR in question has been got registered only to cause humiliation to the applicant. He submits that the complainant has sought to clothe the transaction with criminality even though it is purely civil in nature. Consequently, the applicant is entitled to protection against arrest. In this regard, he has placed reliance on *G. Sagar Suri v. State of U.P.*, (2000) 2 SCC 636; *Indian Oil Corporation v. NEPC India Ltd. & Ors.*, (2006) 6 SCC 736; *K. Jayaram & Anr. v. State*, (2006) 134 DLT 390, and; *Ashok Bhatia & Anr. v. State*, Bail Appl No.1084/2007 decided on 07.08.2007 by this Court.

15. On the other hand, the learned APP and the complainants have vehemently opposed the grant of relief to the applicant. The learned APP has sought to place reliance on the detailed status report dated 03.08.2015 – pointing out that this is a case of multi victim scam involving huge amounts.

16. At this stage, I may observe that Mr. Ohri has argued that this status report was considered by the Court while granting interim protection to the applicant vide order dated 06.11.2015. He further submits that recently, the applicant has answered further questions raised by the I.O. and also submitted several documents in support of his answers. He submits that the said status report dated 03.08.2015, therefore, cannot be looked into by the Court. This submission of Mr. Ohri has only to be stated to be rejected. I shall deal with this submission a little later.

17. The status report dated 03.08.2015, inter alia, reveals that AEZPL had taken loan from the consortium banks comprising Allahabad Bank, Indian Overseas Bank and Bank of Rajasthan (now ICICI Bank). The loan was sanctioned on 12.07.2006. The project land measuring 54903 sq. yds. having market value of over Rs.75 crores was to be mortgaged in favour of the project lenders. 46% of the project area could be sold out, while the remaining 54% was to be retained under lease rental. The lenders were to have the first charge over the project property i.e. 54% of the unsold portion of the project property till liquidation of the loan. AEZPL was required to submit an unconditional undertaking that advance payment/ term payment from the sale of space and lease rental/ advance money will be routed through the company's account with the lenders, and the funds will be used only towards construction of the mall in question. Under the terms of sanction of loan, AEZPL was, inter alia, obliged to open a separate escrow account through which all the transactions were to be routed. Thus, it was mandatory that all sale proceeds should be deposited in the escrow account, and the said sums be utilized only for the project mall.

18. On 31.07.2006, AEZPL entered into an agreement with Allahabad Bank, Bank of Rajasthan and Indian Overseas Bank, wherein it was decided that Allahabad Bank will be appointed as the escrow agent in accordance with the terms of the term loan agreement. The status report states that the accused company, dishonestly, received sale consideration from, inter alia, the complainants and deposited the same in a secret account without informing the lender banks.

19. The term loan agreement was revised on 17.03.2009 and the area permitted to be sold was reduced from 46% to 30%. AEZPL, however, continued to default in repayment of the term loan. Consequently, the said account was classified as NPA on 31.12.2009.

20. Pertinently, the status report discloses the information gathered on investigation with regard to money trail of the amount invested by the complainants and other investors. Investments made by the complainants in the present FIR, and several others, were not deposited in the escrow account opened at Allahabad Bank – the escrow agent. Instead, a new account was opened by AEZPL in State Bank of Saurashtra (now SBI), Lodhi Road, New Delhi and the investment of Rs.19 crores was deposited in this account. This money was diverted and misappropriated to square off personal liabilities of the applicant.

21. So far as the applicant personally is concerned, the status report is highly revealing. Investigation has found that the applicant is a promoter/director and related to around 44 companies/ entities as per his own declaration given under the Companies Act. List of the said 44 companies/entities, particulars whereof are claimed to have been provided by the applicant himself in Form No.24AA, also forms part of the status report.

22. Investigation has found that the money was routed and re-routed through these companies/ entities and siphoned off from AEZPL. The accused/ applicant had induced the victims to invest in AEZPL by executing agreement to sell on the representation of assured returns and that they had the right to sell their space. The assured return was paid till 31.03.2009 and

thereafter no payment was made. Investigation has further revealed that AEZPL received Rs.219 crores from a foreign investor Mondon (i.e. investment of Rs.153 crores, and in the form of equity of Rs.66 crores). AEZPL had also received term loan of Rs.90 crores from the consortium of banks, and investments had been made by investors to the tune of Rs.120 crores.

23. Pertinently, investigation has revealed that amounts – to the tune of Rs.63 crores, advanced as loans by AEZPL to the entities of the applicant have been written off as bad debts. Huge amount of monies are recoverable by AEZPL from several entities which have to be identified by the accused/applicant.

24. Investigation has further revealed that the applicant had spent around Rs.50 crores (as per circle rate) to purchase several properties between 15.02.2008 and 31.03.2008. This was during the period when AEZPL received around Rs.175 crores from Mondon. Two properties were purchased in the name of Aeren R Township and M/s Yashwardan Infrastructure Pvt. Ltd. worth around Rs.18 crores on 22.02.2008 at village Bonkar Dogra, Ludhiana. The trail of money when followed, revealed that the money received from Mondon i.e. Rs.66 crores against sale of equity in the company M/s AR Developers Pvt. Ltd. on 12.02.2008, was transferred on the same day into the account of Aeren R Township and Yashwardan Infrastructure Pvt. Ltd. for purchase of land.

25. It is also pertinent to note that the DRT-II, Delhi, while dismissing several applications moved by the accused company AEZPL, made

observations in its order dated 02.09.2014 that the banks are correct in saying that the sale consideration received from ACIL and Aeren and several other buyers has been siphoned off without paying the bank.

26. Investigation had also identified a sham company by the name of Global Distributors Ltd., in which Rs.39 crores were transferred by the accused company AEZPL and the said amount was written off. Investigation has revealed that the said company Global Distributors Ltd. was controlled by none other than the applicant.

27. The status report sets out the justification as to why custodial interrogation of the application is required in the following words:

“The custodial interrogation of accused is required for the following purpose:-

- a. The accused are having interest in 44 companies as per his own declaration under companies act and is to be verified as what actual work was going on is being carried out. The books of accounts including balance sheets, minutes books etc. of these companies needs to be identified and recovered, which is possible only by way of custodial interrogation.*
- b. During the course of investigation it was confirmed that the money received from foreign investor M/s Mondon Investment was credited Rs.329,031,322.55 & Rs.332,771,280.75 in Account No.34140009 in the Account of M/s A.R. Developers Pvt. Ltd. & Rs.193,546,322.55, Rs.900,446,280.75, Rs.344,040,862.75, Rs.41,345,683.20 & Rs.24,804,220.60 of A/c No.341407001 in account of M/s Aeren Entertainment Zone Pvt. Ltd. There are around 30 banks accounts which have been identified of different companies in which the money received was routed and*

rerouted. The custodial interrogation of accused is required to ascertain utilization and usage of money.

c. The company of accused Rajesh J Aeren i.e. M/s Aeren Entertainment Zone Pvt. Ltd. had advanced money to the following companies and written off as debts not recoverable:

- | | |
|------------------------------------|--------------------------|
| <i>1. Aeren R Enterprises</i> | <i>Rs.48,49,130/-</i> |
| <i>2. Aerern R Township</i> | <i>Rs.5,15,416/-</i> |
| <i>3. Canvas</i> | <i>Rs.2,40,77,270/-</i> |
| <i>4. Pivot</i> | <i>Rs.4,40,38,000/-</i> |
| <i>5. Perfection</i> | <i>Rs.2,58,00,000/-</i> |
| <i>6. Shree Mahesh Realtors</i> | <i>Rs.41,00,000/-</i> |
| <i>7. Global Distributors Ltd.</i> | <i>Rs.39,47,00,000/-</i> |
| <i>8. AR Developers</i> | <i>Rs.13,39,00,000/-</i> |

The ultimate beneficiary in all the cases where debts have been written off is Rajesh Aeren Group. The custodial interrogation of accused Rajesh J Aeren is required to ascertain the operation of the sham/ dummy company M/s Global Distributors Ltd. in which Rs.39.74 crores has been written off. The balance sheet of the accused company for the year ended 31.12.2009 annexed herewith and marked as Annexure G. The accused company has not filed any balance sheet after the year 2009, and thus there is no document on record/ public domain disclosing or mentioning the utilization of funds or money trail.

d. As per company own affidavit they had received Rs.120 crores approximately in the companies account against sale of space but there are several anomalies such as investment as Global Distributors Ltd. of Rs.9 crores

investment of Neelam Kochar of Rs.20 crores which is yet to be ascertained as in which account the said money has been credited. The custodial interrogation is required to identify the accounts, if any, in which the money received from such creditors, to collect the agreements executed with such investors against sale of space or it is merely a book entry.

e. The role of co-conspirators is to be ascertained.

It is a multi victim case. More victims likely to come and as per affidavit furnished by the accused company Aeren Entertainment Zone Pvt. Ltd. before Hon'ble Delhi High Court there are more than 100 victims and amount involved is Rs.120 crores. However, as per the complaint, the accused company has siphoned off Rs.727 crores and thus, the custodial interrogation is required to ascertain the exact amount and its utilization”.

28. The status report states that the total amount of money used to square off personal liability needs to be quantified, and the documents in relation thereto need to be recovered, which would not be possible without the custodial interrogation of the accused, as the accused have cleverly siphoned off huge amounts of money through various companies. By diverting the money required to be deposited with the escrow agent under the term loan agreement into another account, the accused persons caused wrongful loss to the investors and cheated the consortium of banks, who granted the term loan.

29. The status report also mentions that Mondon – the foreign investor has filed FIR No.157 dated 14.11.2012 against the accused. Yet another FIR being FIR No.172/2014, PS Barakhamba Road has been filed against the accused persons. It also reveals that the applicant/ accused did not join

the investigation on the dates it was fixed for, but he appeared later. Without informing the I.O., he proceeded to Dubai in March 2015. As he was absconding, NBW were issued against him twice from the Court of the learned CMM, Patiala House Courts. Red corner notice had also been issued against the applicant through CBI, Interpol Wing, New Delhi and the name of the applicant was mentioned by Interpol in the category of “wanted person”.

30. The status report concludes by stating that Rs.32,93,31,285/- were invested by complainants/ victims for the purpose of purchasing space in Festival City Mall. However, on account of failure to deposit the said amount in the escrow account as stipulated by the consortium of banks, the complainants stand cheated as neither they have been handed over the shops booked by them – which have since been assigned to the Asset Reconstruction Company M/s Phoenix by the bank against payment, nor they have been given back the amount paid to the accused for the purpose of the shops.

31. The learned APP has also submitted that the applicant has not been cooperating in the investigation. Some of the questions to which answers were sought from the accused/ applicant, and the answers given by him in response to the questionnaires, which have been referred to and relied upon by the learned APP are as follows:

“Q3. Why amount received from the complainant Deepak Kumar and other were not deposited in the designated Escrow account.

Ans. To facilitate buyers on their request banks A/cs were opened in their bank. It also ensured money to come to A/c quickly as desired by buyers. However these monies are duly reflected in the books of accounts and bank were kept into loop and informed time to time about these transaction in Quarterly MTGS. In restructuring proposal in 2009, banks acknowledged all these sales and re-scheduled the proposal.

Q4. Can you provide the documents on the basis of which you are saying that you had informed the bank.

Ans. Yes.

Q5. When money of victim was returned on the same date of investment then when the amount in question i.e. around 20 crores was invested in the project.

Ans. Money was received in the company account and all money's received from sales/ others are deployed in the project. A sheet supporting this fact can be submitted ASAP".

... ..

Q12. The Chartered Accountant Mr. Sanjeev Bhargav who audited the balance sheet of Global Distributor Ltd. has stated that this company belongs/ related to your company AEZPL, AR Developers & AVM.

Ans. I don't know Mr. Sanjeev Bhargava and can't comment on his statement.

Q13. Rs.39 crores has been written off by AEZPL of Global Distributor Ltd. comment.

Ans. Due to merger of AVM into AEZPL these accounts were to be written off. AEZPL has never paid Rs.39 crores has never paid/ received these amounts. These amounts were paid by AVM to various companies and this were discussed post merger board meeting of AEZPL to write off these entries to clean the balance sheet also please refer to schedule N of share holder

agreement which says the land should come at book value and how the balance sheet will look like is mentioned.

Q14. There are properties at Village Bonkar Dogra Ludhiana in the name of your related/ sister concerns namely M/s Yashvardan Infrastructure Pvt. Ltd., Aeren R Buildcon Pvt. Ltd., Aeren R Township Pvt. Ltd., PMC Entertainment Pvt. Ltd., Aeren R Malls Pvt. Ltd. and Yashraj Buildcon Pvt. Ltd. What is the status of the land at present? Is there any project in process at the said land. Comment.

Ans. Present status of the above said lands can be checked from their respective management.

Yes, there is project in progress in the above said land.

Q15. Where are the title deeds of the said land?

Ans. Their respective management can answer this”.

32. Learned APP submits that the aforesaid answers given to the specific queries are evasive. Pertinently, the applicant does not deny the fact that the amounts received from the complainants Deepak Kumar and Bharat Bhushan Kumar, and others were not deposited in the designated escrow account of Allahabad Bank. The applicant has sought to give frivolous reasons for not complying with the conditions of the term loan. It is further pointed out that even in the subsequent reply sent to the same queries (which have been tendered in Court today during the course of hearing, and which, according to Mr. Ohri, have not been considered in the status report) are the same. The answer given to query no.3, as extracted above, is more or less identical with that given earlier by the applicant. This aspect has been pointed out to Mr. Ohri during the course of hearing, and he has no comment to offer.

33. Learned APP further points out that though the applicant stated that he could provide documents on the basis of which he had answered query no.3, as extracted above, he has not provided any document to show that the deposit of the monies of the investors in an account – other than the escrow account, was with the consent of the consortium lenders. All that the applicant has provided now are the progress reports of the project Festival City Mall along with the certificate of a Chartered Accountant and project photographs. These documents were, if at all, sent after the investment made by the investors had been diverted into an undisclosed account with the SBI, Lodhi Road, New Delhi. The answer given by the applicant itself shows that he is seeking to impute knowledge about the diversion of fund by him and his company obliquely to the consortium lenders.

34. The further documents filed by the applicant purport to contain the broad breakup of payment made in relation to the Festival City Mall project and the ledger details of the parties/ entities to whom the monies have been allegedly paid. These documents run into 100s of pages. However, Mr. Ohri has not been able to point out the specific amounts paid to the complainants/ investors, not demonstrate that the investments were refundable, or that the same stands refunded. A perusal of the tabulation filed along with this compilation shows that most of the payments claimed to have been made, if made, have been made to the agencies who may have engaged to carry out the work for the development of the mall. Moreover, the said tabulation are not even certified by a Chartered Accountant.

35. Learned APP has pointed out that the non-cooperation of the applicant during the course of investigation is evident from the fact that he even

sought to disown the Chartered Accountant who had prepared the audited balance sheet of Global Distributor Ltd. – which is a company of the applicant himself. When he was questioned about the work carried out by the Chartered Accountant, Mr. Sanjeev Bhargava, he stated that he did not know him and he cannot comment on his statement.

36. It is also pertinent to note that in subsequent reply given by the applicant, pertaining to properties held in village Bonkar Dogra, Ludhiana in the name of the sister concern M/s Yashvardan Infrastructure Pvt. Ltd., Aeren R Buildcon Pvt. Ltd., Aeren R Township Pvt. Ltd., PMC Entertainment Pvt. Ltd., Aeren R Malls Pvt. Ltd. and Yashraj Buildcon Pvt. Ltd., the applicant avoided giving an answer by stating that the present status of the lands could be checked from the respective management and that he has no information of the present management of the said companies. This statement of the applicant demonstrates the non-cooperative attitude of the applicant. He also responded, when asked about the title deeds of the said land, by stating that the respective management could answer the said query. Conveniently, the applicant has forgotten that he himself is the management of the said companies.

37. The submission of Mr. Ohri that the Court had considered the status report dated 03.02.2015 before passing the order dated 06.11.2015 and, therefore, the same cannot be used by the respondent for the purpose of opposing the present application, has no merit. Firstly, a perusal of the order dated 06.11.2015 does not show that the Court examined the said status report before passing the order dated 06.11.2015. Secondly, the Court did not pass a detailed and reasoned order while granting interim protection to

the applicant. A perusal of the order shows that the said order came to be passed on the Court being informed that the applicant shall return from Dubai to submit to the jurisdiction of this Court and that he shall remain present in Court on 23.11.2015. It was for this reason that the Court granted interim protection to the applicant subject to the condition that he shall surrender his passport to the I.O. and also give an undertaking that he shall not leave the country without prior permission of the Court. In any event, the same being only an ad-interim order of protection cannot be relied upon to say that this Court is bound to continue the same even after hearing detailed arguments on both sides.

38. The submission of Mr. Ohri that the said status report does not take into account the subsequent developments, namely, the fact that the applicant has given further answers to the questionnaire along with the documents, also has no merit. Firstly, it is not the case of Mr. Ohri that the contents of the first status report stand belied. Though the same has not been referred to and relied upon, I find that the applicant has filed a counter to the status report filed by the State. A perusal of the same shows that there is no serious challenge to the allegations made against the applicant on the basis of the investigation carried out by the investigating agency.

39. A further status report dated 24.05.2016 has been tendered by the learned APP. This status report is a short report, and it does not seek to resile from the earlier status report. In fact, the same is reiterated inasmuch, as, it is stated that the case is a multi-victim case and the amount involved is huge.

40. It is clear that the modus-operandi of the applicant, after obtaining interim protection on 06.11.2015 has been to keep dilly-dallying and not letting the matter proceed. It is clear from the status report that the applicant has not been joining investigation and cooperating with the investigating agency, and at his own sweet will, he has been tendering documents. The whole idea seems to be to keep the investigating agency embroiled in the maize of documents, so that the hearing of this application does not proceed. However, as noticed above, even these latest replies submitted by the applicant to the questionnaire contain evasive replies which are more or less verbatim the same as the earlier replies given by the applicant.

41. The status report, which has been taken note of hereinabove, is highly revealing. As per the status report, right from the beginning, the amounts were received from the investors/ complainants, and appropriated, in contravention of the terms of the term loan agreement received from the consortium of banks. The status report also shows that there are serious allegations of misappropriation and diversion of large amounts of monies by the company of the applicant AEZPL into other home grown entities, whereafter the said advances were written off as bad debts. Information with regard to the companies in the names of which lands have been purchased has been suppressed from the investigating agency by claiming that the management of those entities would be able to answer the queries. According to the investigating agency, the applicant himself is managing the said companies.

42. The justification offered by the State for custodial interrogation of the applicant taken note of hereinabove appear to be completely in order.

Reliance placed by the applicant on *Siddharam Satlingappa Mhetre* (supra), *Sumit Mehta* (supra), *G. Sagar Suri* (supra), *Indian Oil Corporation* (supra), *K. Jayaram* (supra), and *Ashok Bhatia* (supra), is of no avail in the facts of the present case.

43. In *Gurbaksh Singh Sibbia* (supra), the Supreme Court disagreed with the Full Bench judgment of the Punjab High Court giving restrictive meaning to Section 438 Cr.P.C. The Supreme Court held that the question whether to grant anticipatory bail depends for its answer on a variety of circumstances, the cumulative effective of which must enter into the judicial verdict. Any one single circumstance cannot be treated as of universal validity or as necessarily justifying the grant or refusal of bail. The High Court or the Court of Session – to whom the application for anticipatory bail is made, ought to be left free in the exercise of their judicial discretion to grant bail if they consider it fit so to do on the particular facts and circumstances of the case and on such conditions as the case may warrant, on considerations similar to those mentioned in Section 437 or which are generally considered to be relevant under Section 439 of the Code. The judicial discretion vested under Section 438 should not be read down by reading into the statute, conditions that are not to be found therein. The Supreme Court held that there is no warrant for reading into Section 438 the conditions and limitations subject to which bail can be granted under Section 437(1). The Supreme Court in paragraph 41 of its aforesaid decision, *inter alia*, observed:

“... .. there is an important principle involved in the insistence that facts, on the basis of which a direction under

Section 438(1) is sought, must be clear and specific, not vague and general. It is only by the observance of that principle that a possible conflict between the right of an individual to his liberty and the right of the police to investigate into crimes reported to them can be avoided. A blanket order of anticipatory bail is bound to cause serious interference with both the right and the duty of the police in the matter of investigation because, regardless of what kind of offence is alleged to have been committed by the applicant and when, an order of bail which comprehends allegedly unlawful activity of any description whatsoever, will prevent the police from arresting the applicant even if he commits, say, a murder in the presence of the public. Such an order can then become a charter of lawlessness and a weapon to stifle prompt investigation into offences which could not possibly be predicated when the order was passed. Therefore, the court which grants anticipatory bail must take care to specify the offence or offences in respect of which alone the order will be effective. The power should not be exercised in a vacuum.”

44. In ***Siddharam Satlingappa Mhetre*** (supra), the Supreme Court, *inter alia*, observed:

“109. A good deal of misunderstanding with regard to the ambit and scope of Section 438 CrPC could have been avoided in case the Constitution Bench decision of this Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] was correctly understood, appreciated and applied. This Court in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] laid down the following principles with regard to anticipatory bail:

(a) Section 438(1) is to be interpreted in the light of Article 21 of the Constitution of India.

(b) Filing of FIR is not a condition precedent to exercise of power under Section 438.

(c) Order under Section 438 would not affect the right of police to conduct investigation.

(d) Conditions mentioned in Section 437 cannot be read into Section 438.

(e) Although the power to release on anticipatory bail can be described as of an “extraordinary” character this would “not justify the conclusion that the power must be exercised in exceptional cases only”. Powers are discretionary to be exercised in the light of the circumstances of each case.

(f) Initial order can be passed without notice to the Public Prosecutor. Thereafter, notice must be issued forthwith and question ought to be re-examined after hearing. Such ad interim order must conform to requirements of the section and suitable conditions should be imposed on the applicant.

110. *The Law Commission in July 2002 has severely criticised the police of our country for the arbitrary use of power of arrest which, the Commission said, is the result of the vast discretionary powers conferred upon them by this Code. The Commission expressed concern that there is no internal mechanism within the Police Department to prevent misuse of law in this manner and the stark reality that complaint lodged in this regard does not bring any result. The Commission intends to suggest amendments in the Criminal Procedure Code and has invited suggestions from various quarters. Reference is made in this article to the 41st Report of the Law Commission wherein the Commission saw “no justification” to require a person to submit to custody, remain in prison for some days and then apply for bail even when there are reasonable grounds for holding that the person accused of an offence is not likely to abscond or otherwise misuse his liberty. Discretionary power to order anticipatory bail is required to be exercised keeping in mind these sentiments and spirit of the judgments of this Court in Sibbia case[(1980) 2 SCC 565 : 1980 SCC (Cri) 465] and Joginder Kumar v. State of U.P.[(1994) 4 SCC 260 : 1994 SCC (Cri) 1172]*

Relevant consideration for exercise of the power

111. *No inflexible guidelines or straitjacket formula can be*

provided for grant or refusal of anticipatory bail. We are clearly of the view that no attempt should be made to provide rigid and inflexible guidelines in this respect because all circumstances and situations of future cannot be clearly visualised for the grant or refusal of anticipatory bail. In consonance with the legislative intention the grant or refusal of anticipatory bail should necessarily depend on the facts and circumstances of each case. As aptly observed in the Constitution Bench decision in Sibbia case [(1980) 2 SCC 565 : 1980 SCC (Cri) 465] that the High Court or the Court of Session has to exercise their jurisdiction under Section 438 CrPC by a wise and careful use of their discretion which by their long training and experience they are ideally suited to do. In any event, this is the legislative mandate which we are bound to respect and honour.

112. *The following factors and parameters can be taken into consideration while dealing with the anticipatory bail:*

- (i) The nature and gravity of the accusation and the exact role of the accused must be properly comprehended before arrest is made;*
- (ii) The antecedents of the applicant including the fact as to whether the accused has previously undergone imprisonment on conviction by a court in respect of any cognizable offence;*
- (iii) The possibility of the applicant to flee from justice;*
- (iv) The possibility of the accused's likelihood to repeat similar or other offences;*
- (v) Where the accusations have been made only with the object of injuring or humiliating the applicant by arresting him or her;*
- (vi) Impact of grant of anticipatory bail particularly in cases of large magnitude affecting a very large number of people;*
- (vii) The courts must evaluate the entire available material against the accused very carefully. The court must also clearly*

comprehend the exact role of the accused in the case. The cases in which the accused is implicated with the help of Sections 34 and 149 of the Penal Code, 1860 the court should consider with even greater care and caution because overimplication in the cases is a matter of common knowledge and concern;

(viii) While considering the prayer for grant of anticipatory bail, a balance has to be struck between two factors, namely, no prejudice should be caused to the free, fair and full investigation and there should be prevention of harassment, humiliation and unjustified detention of the accused;

(ix) The court to consider reasonable apprehension of tampering of the witness or apprehension of threat to the complainant;

(x) 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.

113. Arrest should be the last option and it should be restricted to those exceptional cases where arresting the accused is imperative in the facts and circumstances of that case. The court must carefully examine the entire available record and particularly the allegations which have been directly attributed to the accused and these allegations are corroborated by other material and circumstances on record.”

45. As observed by the Supreme Court in **Gurbaksh Singh Sibbia** (supra) an order granting anticipatory bail cannot be allowed to become a charter of lawlessness and a weapon to stifle prompt investigation into the offences.

46. In **Omkar Prasad Mishra v. State**, 2012 I AD (Del) 821, the property involved was situated in a posh locality of Delhi, namely, Golf Links. The

claim of the accused was premised on documents which, prima-facie, appeared to be forged or purported to have been executed after the death of the original owner of the property. When an application for mutation was made to the L&DO in respect of the plot, the L&DO got the FIR registered for the offence of cheating and forgery, and for using forged documents as genuine. The applicant in that case had failed to produce the original title documents, namely, the gift deed on the basis of which he was claiming ownership. In this background, the learned Judge observed:

“7. The question, which now arises for consideration is as to whether, the petitioner deserves to be enlarged on bail in respect of these allegations or not. Obviously, there is no allegation that the petitioner is going to flee from the processes of law or tamper with the evidence but at the same time the nature of allegations which are levelled against the petitioner are of such a nature that in my view would require custodial interrogation because the petitioner has not been forthcoming and cooperating with the investigating agency by producing the original documents with regard to his ownership purported to have been executed by the actual owner Smt.Raseel Kohli. He is further taking false pleas that these documents have already been handed over to the complainant. The property situated in Golf Links is a valuable property. The legal heirs of Smt.Raseel Kohli are stated to have filed a suit against the petitioner also. This, prima facie, shows that the petitioner needs to be interrogated not with a bail order in his pocket.” (emphasis supplied)

47. In *Sudhir v. State & Anr.*, CrI. A. No.1286-87/2015 decided on 01.10.2015, the Supreme Court relied upon an earlier decision in *State of A.P. Vs. Bimal Krishna Kundu and Another*, (1997) 8 SCC 104, wherein the Supreme Court had, *inter alia*, observed:

“10. x x x x x x x x

12. We are strongly of the opinion that this is not a case for exercising the discretion under Section 438 in favour of granting anticipatory bail to the respondents. ***It is disquieting that implications of arming the respondents, when they are pitted against this sort of allegations involving well-orchestrated conspiracy, with a pre-arrest bail order, though subject to some conditions, have not been taken into account by the learned Single Judge. We have absolutely no doubt that if the respondents are equipped with such an order before they are interrogated by the police it would greatly harm the investigation and would impede the prospects of unearthing all the ramifications involved in the conspiracy. Public interest also would suffer as a consequence. Having apprised himself of the nature and seriousness of the criminal conspiracy and the adverse impact of it on “the career of millions of students”, learned Single Judge should not have persuaded himself to exercise the discretion which Parliament had very thoughtfully conferred on the Sessions Judges and the High Courts through Section 438 of the Code, by favouring the respondents with such a pre-arrest bail order.***” (emphasis supplied)

48. In ***Sudhir*** (supra), the Supreme Court declined to grant pre-arrest bail to the appellant while observing:

“13. Having considered the submissions made by learned counsel for the parties, and after considering the gravity of the offence, circumstances of the case, particularly, the allegations of corruption and misappropriation of public funds released for rural development, and further considering the conduct of the appellants and the fact that the investigation is held up as the custodial interrogation of the appellants could not be done due to the anticipatory bail, we are of the opinion that the High

Court has rightly cancelled the anticipatory bail granted to the appellants by the Additional Sessions Judge, Jalgaon.”

49. The custodial interrogation of the applicant, in the light of the aforesaid legal position; in the facts of the present case, and; the conduct of the applicant, in my view, is necessary to unravel the truth and to unearth the money trail and the assets which may have been acquired by the alleged diversion and defalcation of funds. Consequently, the present application is dismissed.

50. It is made clear that this Court has examined the facts of the case at a prima-facie stage for the purpose of consideration of the present application and has not returned any finding of fact either in favour of the applicant or in favour of the State. The Trial Court shall arrive at its own findings on the basis of evidence adduced before it and shall not be influenced by the prima-facie observations made in this order.

VIPIN SANGHI, J

JULY 19, 2016

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