

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.**

1. CRM-M-No. 35664 -2019
Date of Decision: 13.11.2019

VIVEK HARIVYASI ...PETITIONER

VERSUS

SERIOUS FRAUD INVESTIGATION OFFICE ...RESPONDENT

2. CRM-M- 34442 -2019

VIVEK HARIVYASI ...PETITIONER

VERSUS

SERIOUS FRAUD INVESTIGATION OFFICE ...RESPONDENT

CORAM: HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

Present: Mr. R. S. Rai, Senior Advocate with
Mr. Prsouk Jain, and
Ms. Rabiya Thakur, Advocates
for the petitioner

Mr. Chetan Mittal, Assistant S.G.I. with
Mr. Alok Kumar Jain, Senior Panel Counsel
and Mr. Himanshu Gupta, Advocate for
SFIO.

Mr. Parshant Baliyan, Investigating Officer; in person.

RAJBIR SEHRAWAT, J.

This order shall dispose of above-said two petitions.

These petitions have been filed under Section 482 and under
Section 439 of the Code of Criminal Procedure, for quashing the order dated
22-07-2019, whereby the default bail granted to the petitioner has been
cancelled and for seeking bail pending trial in the same case, respectively,

since he has been taken into custody in the case Criminal Complaint No.3 (or

5) of 18.05.2019 **CIS No. COMA/05/2019, CNR NO. HRGR01-007022-2019 titled as SFIO VS. ADARSH BUILD ESTATE ETC.** in which he has been summoned under Sections 447 of the Companies Act 2013 read with 120-B of IPC and under Sections 417, 418, 420, 477-A IPC read with Section 120-B of the IPC, and also for the offences punishable under Section 74 (3) and 76A of the Companies Act 2013, as well as, for offence punishable and Section 447 of the Companies Act, 2013 on several counts, which is pending in the Court of Special Judge, Gurugram.

It deserves to be pointed out at the outset that this case is one of the cases in a bunch; which were heard together. However, for making the things more distinct these cases are being decided vide separate judgments. However, since several aspects of the matter are common to all the cases and have even been argued on similar lines and even jointly, therefore, some aspects of the matter would form part of all the judgments.

The brief facts constituting allegations in this case are that one Multilevel Co-operative Society was got registered by one Mukesh Modi and family in the name of Adarsh Credit Co-operative Society Ltd. (hereinafter referred to as the Co-operative Society or (ACCSL). That Co-operative Society collected deposits from about 22 lakh investors. In the process about Rs.5000 Crores were collected from investors from general public; which remained unreturned to the investors and, accordingly an amount of approximately Rs.9253 Crores, including interest, is reflected in the accounts of the Society ACCSL, as payable to the investors. After collecting this money from the public, Mukesh Modi and family created a large number of Companies under the aegis of Adarsh Group of Companies Ltd. (AGCL), with their associates and relatives as the Directors. Subsequently these

companies were shown having been advanced the loans of about Rs.1700 Crores by the Co-operative Society (ACCSL). Loans were required to be returned to the Co-operative Society by these Companies with interest, as per the alleged agreements of advancement of money. However, the same were not returned by the Companies. Therefore the money of the Co-operative Society was allegedly, being siphoned off through the Companies created by Adarsh Group of Companies Limited. When the matter came to knowledge of the Central Government, the Central Government, through Ministry of Corporate Affairs, vide the order dated 28/06/2018, passed in exercise of powers conferred under section 212 (1) of Companies Act 2013 and section 43(2) & (3)(c)(i) of LLP Act 2008, ordered an investigation into the affairs of the said companies, through the Serious Fraud Investigation Office (hereinafter referred to as SFIO), which is an instrumentality created under the new Companies Act, 2013 for investigation into the affairs of the companies. During investigation it came out that 70 Companies of the Adarsh Group of Companies Ltd. had shown Rs.4140 Crores approximately, including interest, as payable to the said Co-operative Society; as the loan yet to be repaid. Still further, during investigation some persons and companies out-side the Adarsh Group of Companies were also found to be the alleged collaborators of the Adarsh Group and those companies were also taken under investigation. Accordingly, a total of about 125 Companies (hereinafter referred to as CUIs), and some individuals, including the petitioner and his Companies as conspirators; were taken under investigation. After completion of the investigation and taking necessary permissions from the Central Government, SFIO presented the investigation report in the form of a statutory Complaint before the Special Court at Gurugram on 18.5.2019.

his 5 companies are arrayed as the accused at Sr. No. 79 and at Sr. No 90 to 93. Under the provisions of section 212 (15) of Companies Act 2013, such a report be taken as a report presented under section 173 of Cr.P.C. After receipt of the report from the SFIO, the Special Court summoned various accused including the CUIs and other individuals, under different sections of the Old Companies Act and the New Companies Act, 2013.

The petitioner was summoned by the Special Court under Sections 447 of the Companies Act 2013 read with 120-B of IPC and under Sections 417, 418, 420, 477-A IPC read with Section 120-B of the IPC alongwith his co-accused, and also for the offences punishable under Section 74 (3) and 76A of the Companies Act 2013, as well as, for offence punishable and Section 447 of the Companies Act, 2013 on several counts, some of which are cognizable and non-bailable as per the provisions of the New Companies Act, 2013; and which are punishable with upto 10 years of imprisonment.

However, during investigation since the role of the petitioner had surfaced in the very beginning, therefore, at the initial stage itself when the investigation was started against the CUIs of Adarsh Group, the petitioner was arrested on 10.12.2018. However, since the investigation could not be completed within the specified statutory period, therefore, the petitioner had moved an application seeking the default bail under section 167(2) Cr.P.C. read with section 212(10) and section 436 of the Companies Act 2013. Accordingly, allowing his application the petitioner was released on bail vide order dated 15.2.2019. But during the investigation, the role of the petitioner surfaced qua his involvement in multiple frauds through multiple companies and including his own companies, which were created

by him mainly to siphon off the funds of the CUIs of the Adarsh Group. Hence, a comprehensive charge-sheet was filed against him including his role in those frauds; which were neither in the knowledge nor were even contemplated by the Investigating Officer at the time when he had initially arrested the accused/ petitioner. Accordingly, by pleading involvement of the petitioner in new-found and multiple culpability of the petitioner in offence punishable under section 447 of the Companies Act and other offences, the prosecution moved application for cancellation of the default bail granted to the petitioner and since the petitioner had been summoned for several new offences and also for the multiple count of offence punishable under section 447 of the Companies Act, therefore the petitioner had applied for bail pending trial qua all those offences as well. The Special judge / Sessions Judge allowed the application of the prosecution for cancellation of bail and dismissed the application for regular bail moved by the petitioner; vide a common order dated 22-07-2019. Accordingly the petitioner was taken into custody and since then he is in custody. Now the present petitions have been filed; challenging the order of cancellation of bail; and for grant of regular bail. Since the matters are deeply interconnected so both the petitioner are being decided jointly.

Further elaboration of the allegations of the prosecution, specific to the petitioner is; that when the account of the above said 70 CUI of Adarsh Group of Companies were investigated; it was found that Adarsh Group of Companies, a group of 126 companies (AGCL), were being managed/controlled by Mukesh Modi, his family members and associates, including the petitioner Vivek Harivyasi. The petitioner Vivek Harivyasi, was authorized signatory in 90% of the CUIs of Adarsh Group and was a

Director in 50% of the CUI of Adarsh Group. So as per the allegations the petitioner was the front-man for the controllers of the Adarsh Group of Companies to route, re-route and ultimately, siphon off the money from the CUIs of the Adarsh Group, by creating a cobweb of apparently legal transactions.

The broadly; participation of the petitioner alleged in the siphoning off of the money of the CUIs of Adarsh Group is three-fold. Firstly, as authorized signatory, director or the key managerial person of the CUIs the petitioner withdrew the amounts from the bank accounts of the company and created cash-in-hands which was squandered through the cobweb of fictitious transactions. An amount of Rs. 89.23 Crore was created as cash-in-hand through cash withdrawals and was shown as cash in hand in the books of accounts. This amount was siphoned off. This siphoning was given a lawful color by the controllers/accused persons of CUIs in connivance with ACCSL and Jainam Rathod (A-130), a bogus bill provider and habitual entry provider for commissions, by way of showing fake circular transactions involving payment of Share Application Money and bogus purchase of suits length (cloth). The entire transactions involved are alleged to be of Rs. 223.775 Crore which included 30 CUIs and 22 firms, all belonging to Adarsh Group. Still further, huge loans and advances of Rs. 210 Crore had been given without any loans documents or other supporting agreements. During investigation those companies claimed that those loans were provided to them for consolidation of land by purchasing the same for and on behalf of the CUIs of the Adarsh Group. However, neither land was purchased in the name of CUIs nor the funds were returned to them.

Investigation revealed that 8 CUIs and 8 Firms of the Adarsh Group were

involved through a tripartite agreement with the landowners for purchase of land in Noida. However, in these cases siphoning of funds to the tune of Rs. 80 Crore (approx) had happened through these deal and the funds of ACCSL were utilized fraudulently to repay its own loans to 8 CUIs through Firms.

Secondly, Riddhi Siddhi Group of Companies (RSGC) was created, which included 8 companies and was managed and controlled by Mahender Tak (A-155) and his family members; who are also accused in this case. Investigation revealed that the petitioner entered into conspiracy with the co-accused managing this group of companies. These companies were advanced amounts from CUIs of Adarsh Group through fraudulent transactions. The alleged loan so advanced were a self-serving exercise and through this process loans to the tune of Rs. 152.62 Crore were advanced as principal, which as on 31.03.2018; was outstanding at Rs.883 Crore in the accounts of CUIs of Adarsh Group. The said grant of loan lacked any due diligence. Petitioner Vivek Harivyasi, being a Key Managerial Person in CUIs of Adarsh Group and also Director in companies of Riddhi Siddhi Group of Companies (RSGC), which were base at Jaipur and Jammu, misappropriated the funds siphoned from AGCL and RSGC and set up his own network of companies. The loans received by the CUIs of Ridhi Sidhi Group were found to be in violation of the provisions relating to collection of deposits and were never returned to the CUIs of Adarsh Group.

Thirdly, the petitioner being the Key Managerial Person (KMP) of AGCL and RSGC from the year 2008 to 2015 and was managing their real estate business sector. He created his own 5 companies, namely, Cynosure Real Estates Private Limited, EOS Developers Private Limited, Headstrong

International Exports Private Limited, Adler Infra Ventures Private Limited and A3G Infra Private Limited. These companies were owned / controlled by him and were not part of AGCL and RSGC. Vide additional approval; the affairs of these companies were also brought under investigation. Finding these companies also involved in the frauds, these companies have also been made accused in the present complaint.

Investigation revealed that the petitioner Vivek Harivyasi, being a Key Managerial Person in AGCL and RSGC, misappropriated the funds siphoned from AGCL and RSGC to purchase Riyasat Green Farm, Chattarpur in the name of his company Cynosure Real Estates Private Limited (CREP). In the process he was helped by the co-accused Peeyush Aggarwal, Vijay Jhindal, Raj Kumar Modi, and Paramvir Singh Sangwan to launder and invest cash to the tune of Rs.17 Crore. He along with Peeyush Aggarwal held the shares of the company as *Benami* in the name of Garima Sharma. Still further, the petitioner Vivek Harivyasi, as Director/Authorised Signatory of Sun Dream Build Private Limited-CUI of Adarsh group, transferred Rs.12.75 Crore to his own company A3G Infra Private Limited; as advance for land without any agreement. Neither the land in A3G Infra Private Limited was given to CUI nor was the advanced fund returned. The petitioner, Vivek Harivyasi alongwith co-accused Deepak Shrimali, Shinder Pal Singh and Gurbir Singh Sandhu misappropriated this amount. He also infused unaccounted money into A3G by routing through shell companies belonging to Peeyush Aggarwal.

Arguing the case learned counsel for the petitioner submitted that earlier the applicant-accused was released on bail under the provisions of section 167(2) of the Cr.P.C, vide order dated 15.02.19 after being

arrested for commission of an offence as punishable under section 447 of the Companies Act, 2013 only. Now the bail granted to him cannot be cancelled and he cannot be ordered to be arrested only because he has been summoned for additional offences under the Companies Act and some more offences under IPC. Even the additional offences alleged against the petitioner are under the same highest section 447 of Companies Act; for which he was already arrested or the additional offences are also of similar nature or lesser in gravity. For allegation under the same highest offence the petitioner earlier arrested and was granted bail under section 167(2) Cr.P.C. Even after addition of new offences the investigating officer had never demanded custody of the petitioner. No useful purpose shall be served by taking him in custody for additional offence. Once the bail has been granted, even if under section 167(2) Cr.P.C., the same cannot be cancelled unless there is allegation of misuse of the same, or of attempting to influence the witness or of tempering with the evidence or there is a real chance of the accused fleeing from the jurisdiction. Petitioner he had been appearing regularly after being released on bail till cancellation of the bail. Prior to arrest also the petitioner had cooperated with the Investigating Officer and joined the investigation thrice. There is not even a whisper in the pleadings of the prosecution that the petitioner shall flee from the jurisdiction. There are no details of any approach of the petitioner to any of the witnesses of the prosecution so as to influence them. The passport of the petitioner already stands deposited with the court. Criteria for grant and cancellation of bail are altogether different. Very strong case is required for cancellation of bail.

Realizing his predicament qua the nature and quantum and gravity of the allegations and the alleged evidence / material claimed against

him by the prosecution; the Id. Counsel for the petitioner has not even adverted to the merits of the case qua the factual gamut, except to say the case against the petitioner is false and that the relevant transactions were duly reflected in the records of the CUIs of the Adarsh Group and of his own companies. Referring to the alleged evidence collected by the prosecution, learned Counsel for the petitioner submitted that there is no evidence whatsoever against the petitioner. The prosecution is relying upon the alleged disclosure statement of the petitioner. Since the investigating officer of the case also had the power of recording the statement on oath and also very wide power to arrest a person during the investigation, therefore he had the potential to pressurize the accused, and hence any inculpatory statement, allegedly recorded by him during the investigation; cannot be relied upon against the petitioner. Besides the disclosure of the statement of the petitioner, there are either the statements of the co-accused, which again, are not admissible in evidence against the petitioner, or there are the statements of some other witnesses, which are nothing but the hearsay account or the manipulated versions of the transactions involved in the case.

However, it is vehemently argued by the Counsel for the petitioner that the trial court has wrongly taken into consideration the twin conditions, as prescribed under section 212 (6) of the new Companies Act, 2013 for declining bail to the petitioner. Referring to the judgment of the Hon'ble Supreme Court, in case of **Nikesh Tara Chand Shah V/s Union of India and another (2018) 11 SCC 1**, learned Counsel for the petitioner has submitted that the Language of section 212 (6) of the new Companies Act is *pari- materia* with the languages of section 45 of the Prevention of Money Laundering Act. However, the Supreme Court has already declared the

language of the twin conditions, as used in the Prevention of Money Laundering Act, as *ultra vires*. Hence the twin conditions, as contained in section 212 (6) of the new Companies Act, 2013 has also to be treated as *ultra vires* the Constitution of India and as infringing upon the rights of the individual. Hence the trial court could not have invoked the twin conditions, as prescribed under section 212 (6) of the new Companies Act, 2013 for declining bail to the petitioner. Still further it has been argued by the Counsel for the petitioner that even if the twin conditions are taken to be existing on the statute book, still the same cannot be pleaded by the state authorities for opposing the bail application of the petitioner; because these conditions are infringing not only the right to life and liberty of the petitioner guaranteed by Article 21 of the Constitution, rather, are also in violation of the provisions of Article 14, being irrational, illogical and requiring the court to record something which is impossible by any means. The learned Counsel for the petitioner has relied upon the judgment of this court rendered in **Ankush Kumar @ Sonu V/s State of Punjab, 2018 SCC Online P&H 1259** to support his argument.

On the other hand, learned Assistant Solicitor General of India, appearing for SFIO, has argued that earlier the petitioner was arrested at the initial stage when the investigating officer had the material against the petitioner for some of the offences qua some of the CUIs of Adarsh Group only. Since the further investigation had proliferated to the other persons, entities and the companies as well, including the companies of the petitioner, therefore, it could not be completed within the stipulated statutory period. Hence, the petitioner was granted the default bail under section 167(2) Cr.P.C. At that time consideration of material available

against the petitioner was totally immaterial. However, at the conclusion of the investigation the petitioner is found to be the pivotal person; who has managed most of the fraudulent transaction involving the CUIs of the Adarsh Group; in his capacity as the Director and / or the authorized signatory. He is also found having created his own companies, including the *benami* ones; to siphon off the money of the CUIs of the Adarsh Group and having purchased the properties in the name of his own companies by utilizing the funds from the CUIs of the Adarsh Group. Therefore a lot of material has been collected against the petitioner during the investigation. Due to his involvement in frauds by or in the affairs of various companies the petitioner is charge-sheeted under section 447 of the Companies Act on multiple counts, besides under the sections of IPC and the other sections of the Companies Act. Therefore, the bail granted to the petitioner cannot be continued. The question of the bail to the petitioner has to be considered afresh in view of the gravity of offence, material collected against him during the investigation and the restrictive conditions of bail prescribed under the new Companies Act, 2013. Initial failure of the investigating officer to complete the investigation in the prescribed time cannot be taken as a substitute for the consideration of the material collected against the petitioner during the investigation and the gravity of the offence in which the petitioner is found to be involved.

Coming to the factors required to be taken into consideration in case of the petitioner; for granting bail, the Counsel for the SFIO has submitted that the petitioner has been charge-sheeted under section 447 of the new Companies Act, 2013 on multiple counts. Section 212(6) of the new Companies Act, 2013 provides that in case of charge-sheet being filed for

the offences covered by section 447 no court shall grant bail to the accused unless the twin conditions prescribed under section 212(6) are fulfilled. At the time of grant of default bail neither the twin conditions were required to be considered nor were the same capable of being applied due to the material against the petitioner being incomplete. However, now the investigation is complete and sufficient material has already come on record; on the basis of which even the court has summoned the petitioner for serious offence under section 447 of the new Companies Act, 2013 on multiple counts. Hence the default bail granted to the petitioner earlier deserves to be cancelled and the grant of bail afresh to the petitioner has to be considered in view of the mandate of law as contained in section 212(6) of the Companies Act. Hence before granting bail afresh to the petitioner, the court was required to consider the objection of the public prosecutor. Since bail to the petitioner was objected to by the public prosecutor, therefore, finding no grounds to fulfill the twin conditions, the trial court has rightly declined bail to the petitioner. It is further submitted that even if this court is to consider the case of the petitioner for bail, the same conditions would be required to be considered by this court as well. Referring to the reliance of the counsel for petitioner upon the case of **Nikesh Tarachand Shah (supra)** case, *qua vires* of the twin conditions, Id. Counsel for the SFIO has submitted that after that judgment of the Supreme Court, the Parliament has amended the Prevention of Money Laundering Act, 2002 and has removed the inconsistency *qua* the offences punishable under the provisions of Prevention of Money Laundering Act, 2002 and therefore, has rectified the aspect which had earlier led to declaration of the twin conditions under that Act as *ultr-vires*. Still further it is submitted by the Id.

prescribed under section 212 (6) of the new Companies Act, 2013 is under challenge before the Supreme Court in case of **Serious Frauds Investigation Office V/s Neeraj Singhal 2018 SCC Online SC 1573** and other cases, however, the Supreme Court has again reiterated the applicability of the twin conditions for the purpose of consideration for bail, in case of **Nitin Johari (supra)**. So far as the reliance of the Counsel for the petitioner upon the judgment of this Court in case of **Ankush Kumar (Supra)** is concerned, it is submitted by the Counsel for the SFIO that when this court had considered the applicability of the twin conditions in the above said case, this court had specifically observed that the *vires* of the twin conditions would be considered by the appropriate Court / Bench in some appropriate matter. But now the validity of the twin conditions is very much under challenge before the Supreme Court. However, despite pendency of the challenge to the *vires* of the twin conditions, the Supreme Court has set aside the order of the High Court granting bail in case of **Nitin Johari (Supra)** and has remanded the matter to the High Court for reconsideration; with a direction to consider the scope and effect of the twin conditions as prescribed under section 212 (6) of the new Companies Act, 2013; as well as by taking into consideration the other relevant factors; which were spelt out in case of **Y.S. Jagan Mohan Reddy V/s Central Bureau of Investigation, (2013) 7 SCC 439**, and which have been reiterated in case of **Nitin Johari (supra)**. Hence this court should also take into consideration the scope and effect of the twin conditions as prescribed under section 212(6) of the Companies Act, 2013.

On the point of role of and evidence against the petitioner, the counsel for the SFIO has submitted that the investigation has found the

petitioner to be the pivotal person in the processes of frauds with and through the CUIs of the Adarsh Group. He has submitted since, at this stage, the counsel for the petitioner has not even seriously disputed the role of the petitioner on facts of the case, therefore, all the details of allegations need not be repeated or argued here, however, suffices it to say that as authorized signatory, director or the key managerial person of the CUIs the petitioner withdrew the amounts from the bank accounts of the company and created cash-in-hands which was squandered through the cobweb of fictitious transactions. An amount of Rs. 89.23 Crore was created as cash-in-hand through cash withdrawals and was shown as cash in hand in the books of accounts. This amount was siphoned off. This siphoning was given a lawful color by the controllers/accused persons of CUIs in connivance with ACCSL and Jainam Rathod (A-130), a bogus bill provider and habitual entry provider for commissions, by way of showing fake circular transactions involving payment of Share Application Money and bogus purchase of suits lengths (cloth). The entire transactions involved are of Rs. 223.775 Crore which included 30 CUIs and 22 firms, all belonging to Adarsh Group. Still further, huge loans and advances of Rs. 210 Crore had been given without any loans documents or other supporting agreements. Further, Riddhi Siddhi Group of Companies (RSGC) was created, which included 8 companies and was managed and controlled by Mahender Tak (A-155) and his family members; who are also accused in this case. Investigation revealed that the petitioner entered into conspiracy with the co-accused managing this group of companies. These companies were advanced amounts from CUIs of Adarsh Group through fraudulent transactions. The alleged loans so advanced were as a self-serving exercise

advanced as principal, which alongwith interest; as on 31.03.2018; is outstanding at Rs.883 Crore in the accounts of CUIs of Adarsh Group. The said grant of loan lacked any due diligence. Petitioner Vivek Harivvysi, being a Key Managerial Person in CUIs of Adarsh Group and also Director in companies of Riddhi Siddhi Group of Companies (RSGC), which were base at Jaipur and Jammu, misappropriated the funds siphoned from AGCL and RSGC and set up his own network of companies. The loans received by the CUIs of Ridhi Sidhi Group were found to be in violation of the provisions relating to collection of deposits and were never returned to the CUIs of Adarsh Group. Still further, the petitioner being the Key Managerial Person (KMP) of AGCL and RSGC from the year 2008 to 2015 and was managing their real estate business sector. He created his own 5 companies, namely, Cynosure Real Estates Private Limited (CREP), EOS Developers Private Limited, Headstrong International Exports Private Limited, Adler Infra Ventures Private Limited and A3G Infra Private Limited. These companies were owned / controlled by him and were not part of AGCL and RSGC. Investigation revealed that the petitioner Vivek Harivvysi, being a Key Managerial Person in AGC&L and RSGC, misappropriated the funds siphoned from AGC&L and RSGC to purchase Riyasat Green Farm, Chattarpur in the name of his company Cynosure Real Estates Private Limited (CREP). In the process he was helped by the co-accused Peeyush Aggarwal, Vijay Jhindal, Raj Kumar Modi, and Paramvir Singh Sangwan to launder and invest cash to the tune of Rs.17 Crore. He along with Peeyush Aggarwal held the shares of the company as *benami* in the name of Garima Sharma. Still further, the petitioner Vivek Harivvysi, as Director/Authorised Signatory of Sun Dream Build Private Limited-CUI of

Private Limited; as advance for land without any agreement. Neither the land in A3G Infra Private Limited was given to CUI nor was the advanced fund returned. The petitioner, Vivek Harivyasi alongwith co-accused Deepak Shrimali, Shinder Pal Singh and Gurbir Singh Sandhu misappropriated this amount. He also infused unaccounted money into A3G by routing through shell companies belonging to Peeyush Aggarwal. Hence there are serious allegations against the petitioner.

It is further argued on behalf of the SFIO that there are admitting statements of the petitioner and also of the co-accused. Besides, there are lots of entries recovered and found in the companies of the petitioner, the companies of Peeyush Aggerwal and in the companies of Jainam Rathod, which show their collusion in frauds committed upon the CUIs of the Adarsh Group to swindle the money of the Co-operative Society. Therefore if the entire material on record against the petitioner is taken into consideration, by any means; it cannot be said that petitioner is not guilty of the offences under the Companies Act. Still further since the petitioner is highly given to manipulations, for earning money by devising embezzling machinations, therefore by nature the petitioner is manipulative. Hence if the petitioner is released on bail, he is most likely to influence the witnesses of the case and also to destroy the evidence against him. The argument of the learned Counsel for the petitioner that the petitioner had been joining the investigation and was released on interim bail as well; and that during that duration he had not made any attempt to influence the witnesses or to destroy the evidence, is totally irrelevant. At that time the petitioner was not sure of the material and the evidence which the prosecution would be relying against him and was not sure that his all

frauds on multiple counts would be detected during the investigation. Therefore he might not have resorted to that exercise. But now, when the petitioner knows that his crime on multiple counts has been finally detected and the material and the evidence against him have been crystallized, no straightforward conduct is expected from the petitioner, who is manipulative by disposition. In the same vein, the counsel for the SFIO has also submitted that since the vocation of the petitioner and his Companies is only to commit crimes by making fake accommodation entries, showing fake transactions and by creating the cobweb of shell and *Benami* companies; to earn the money, therefore, by any means, it cannot be said that if the petitioner is released on bail, he would not commit any offence again.

In the end it has been argued by the learned counsel for the SFIO that even if the conditions, as prescribed under section 212(6) of the new Companies Act, 2013 are not to be taken into consideration, at least the factors which has been laid down by the Supreme Court in case of **Y. S. Jagan Mohan Reddy(supra)** and which has been reiterated by the Supreme Court in case of **Nitin Johari (supra)**, for the economic offences, has to be considered by the court while considering grant of bail to the petitioner. However, the charge-sheet against the petitioner is under section 447 of the Companies Act, even that not one single count but on multiple counts; which is a serious offence, inviting punishments of imprisonment up to 10 years for each count. The participation of the petitioner in the frauds has duly been established as per the record. Conduct of the petitioner has also not been exemplary in the past. Appreciating it from this angle too; it cannot be ruled out that the petitioner is likely to influence the witnesses and to destroy the evidence against him. Hence the petitioner does not

deserve to be granted bail. The court below has rightly dismissed the bail application filed by the petitioner. Hence the present petition be also dismissed.

Replying to the argument of the counsel for the SFIO, Ld. Counsel for the petitioner submitted that there is absolutely no evidence against the petitioner. So far as the evidence in the form of the statements and the witnesses is concerned, it is again submitted by the Counsel for the petitioner that since the investigating officer has the power akin to the police, therefore, any self-incriminating statement of the petitioner recorded by the investigating officer cannot be relied upon against him. For the same reason the confession of the co-accused cannot be relied against the petitioner. It has also been submitted by the Counsel for the petitioner that even the Supreme Court has granted bail in case of **Sanjay Chandra V/s Central Bureau of investigation, (2012) 1 SCC 40** despite the fact that the offences in that case involved economic offences. The Supreme Court has granted bail even by observing in para No.46 of that judgment that it was conscious of the fact that the offences involved were the economic offences of huge magnitude, and if proved, may even jeopardize the economy of the country. Still the accused in that case were released on bail. The para relied upon by the petitioner reads as under:-

“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. Therefore, their presence in the custody may not be necessary for further investigation. We are of the view that the appellants are entitled to the grant of bail pending trial on stringent conditions in order to allay the apprehension expressed by CBI.”

This judgment was followed even by this Court in case **CRM-M 46946 of 2017 decided on 24-09-2018, D.K. Sethi V/s Central Bureau of Investigation**. It is also vehemently argued by learned Counsel for the petitioner that since the question of bail relates to the life and liberty of the petitioner, therefore, the court has to be liberal in granting the bail, because bail is the rule and the jail is only an exception. The counsel has further argued that the ld. Counsel for the SFIO is wrongly referring to the judgment of the Supreme Court rendered in case of **Y. S. Jagan Mohan Reddy** (Supra) because after the charge-sheet was filed against **Y. S. Jagan Mohan Reddy**; he was also granted by the trial court in that case.

This court has heard the arguments of the respective counsels for the parties and has perused the record. The concept underlying the criminal procedure is to avoid unnecessary incarceration of any person. Hence; if a person is arrested and the investigation is not completed within the statutory period then Section 167 Cr.P.C. provides relief to the accused; which reads as under:-

Section 167: Procedure when investigation cannot be completed in twenty-four hours. –

(1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 57, and there are grounds for believing that the accusation or information is well-founded, the officer-in-charge of the police station or the

police officer making the investigation, if he is not below the rank of sub-inspector, shall forthwith transmit to the nearest Judicial Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole; and if he has no jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that -

[(a) the Magistrate may authorise the detention of the accused person, otherwise than in the custody of the police, beyond the period of fifteen days, if he is satisfied that adequate grounds exist for doing so, but no Magistrate shall authorise the detention of the accused person in custody under this paragraph for a total period exceeding,

- (i) ninety days, where the investigation relates to an offence punishable with death, imprisonment for life or imprisonment for a term of not less than ten years;
- (ii) sixty days, where the investigation relates to any other offence, and, on the expiry of the said period of ninety days, or sixty days, as the case may be,

the accused person shall be released on bail if he is prepared to and does furnish bail, and every person released on bail under this sub-section shall be deemed to be so released under the provisions of Chapter XXXIII for the purposes of that Chapter;]

[(b) no Magistrate shall authorise detention of the accused in custody of the police under this Section unless the accused is produced before him in person for the first time and subsequently every time till the accused remains in the custody of the police, but the Magistrate may extend further detention in judicial custody on production of the accused either in person or through the medium of electronic video linkage.]

(c) no Magistrate of the second class, not specially empowered in this behalf by the High Court, shall authorise detention in the custody of the police.

[*Explanation I* - For the avoidance of doubts, it is hereby declared that, notwithstanding the expiry of the period specified in paragraph (a), the accused shall be detained in custody so long as he does not furnish bail.]

[*Explanation II*. - If any question arises whether an accused person was produced before the Magistrate as required under clause (b), the production of the accused person may be proved by his signature on the order authorising detention or by the order certified by the Magistrate as to production of the accused

person through the medium of electronic video linkage, as the case may be:]

[Provided further that in case of woman under eighteen years of is, the detention shall be authorised to be in the custody of a remand home or recognized social institution.]

[(2-A) Notwithstanding anything contained in sub-section or (1) sub-section (2), the officer-in-charge of the police station or the police officer making the investigation, if he is not below the rank of a sub-inspector, may, where a Judicial Magistrate is not available, transmit to the nearest Executive Magistrate, on whom the powers of a Judicial Magistrate, or Metropolitan Magistrate have been conferred, a copy of the entry in the diary, hereinafter prescribed relating to the case, and shall, at the same time, forward the accused to such Executive Magistrate, and thereupon such Executive Magistrate, may, for reasons to be recorded in writing, authorise the detention of the accused person in such custody as he may think fit for a term not exceeding seven days in the aggregate; and, on the expiry of the period of detention so authorised, the accused person shall be released on bail except where an order for further detention of the accused person has been made by a Magistrate competent to make such order, and where an order for such further detention is made, the period during which the accused person was detained in custody under the orders made by an Executive Magistrate under this sub-section, shall be taken into account in computing the period specified in paragraph (a) of the proviso to sub-section (2) :

Provided that before the expiry of the period aforesaid, the Executive Magistrate shall transmit to the nearest Judicial Magistrate the records of the case together with a copy of the entries in the diary relating to the case which was transmitted to him by the officer-in-charge of the police station or the police officer making the [investigation], as the case may be.]

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) Any Magistrate other than the Chief Judicial Magistrate making such order shall forward a copy of his order, with his reasons for making it, to the Chief Judicial Magistrate.

(5) If in any case triable by a Magistrate as a summons case, the investigation is not concluded within a period of six months from the date on which the accused was arrested, the Magistrate shall make an order stopping further investigation into the offence unless the officer making the investigation satisfies the Magistrate that for special reasons and in the interest of justice the continuation of the investigation beyond the period of six months is necessary.

(6) Where any order stopping further investigation into an offence has been made under sub-section (5), the Sessions Judge may, if he is satisfied, on an application made to him or otherwise, that further investigation into the offence ought to be

made, vacate the order made under sub-section (5) and direct further investigation to be made into the offence subject to such directions with regard to bail and other matters as he may specify.

However, a bare perusal of these provisions reproduced above shows that after an accused is released on default bail under section 167(2) Cr.P.C., thereafter, the grant of such bail is to be deemed to have been granted under the provisions of Chapter XXXIII; for the purposes of that Chapter. Therefore any aspect on the issue of bail is to be governed by the ordinary provisions of bail; as contained in Chapter XXXIII of Cr.P.C. Hence, once released on bail by virtue of provision of section 167(2) Cr.P.C.; the bail granted to such an accused comes under the restrictive stipulations and enabling provisions as contained in sections 436, 437 and the Section 439 of the Cr.P.C. The Relevant Sections in this regard are as reproduced hereinbelow :-

436. In what cases bail to be taken:- When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceeding before such Court to give bail, such person shall be released on bail :

Provided that such officer or Court, if he or it thinks fit, [may, and shall, if such person is indigent and is unable to furnish surety, instead of taking bail] from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided :

Provided further that nothing in this section shall be deemed to affect the provisions of sub-section (3) of section 116 [or section 446A

[Explanation. - Where a person is unable to give bail within a week of the date of his arrest, it shall be a sufficient ground for the officer or the Court to presume that he is an indigent person for the purposes of this proviso.]

(2) Notwithstanding anything contained in sub-section (1), where a person has failed to comply with the conditions of the bail-bond as regards the time and place of attendance, the Court may refuse to release him on bail, when on a subsequent occasion in the same case he appears before the Court or is brought in custody and any such refusal shall be without prejudice to the powers of the Court to call

upon any person bound by such bond to bond to pay the penalty thereof under section 446.

437. When bail may be taken in case of non bailable offence:-

[(1) When any person accused of, or suspected of, the commission of any non-bailable offence, is arrested or detained without warrant by an officer in charge of a police station or appears or is brought before a Court other than the High Court or Court of Session, he may be released on bail, but -

- (i) such person shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life;
- (ii) such person shall not be so released if such offence is a cognizable offence and he had been previously convicted of an offence punishable with death, imprisonment for life or imprisonment for seven years or more, or he had been previously convicted on two or more occasions of a cognizable offence punishable with imprisonment for three years or more but not less than seven years.

Provided that the Court may direct that a person referred to in clause (i) or clause (ii) be released on bail if such person is under the age of sixteen years or is a woman or is sick or infirm:

Provided further that the Court may also direct that a person referred to in clause (ii) be released on bail if it is satisfied that it is just and proper so to do for any other special reason:

Provided also that the mere fact that an accused person may be required for being identified by witnesses during investigation shall not be sufficient ground for refusing to grant bail if he is otherwise entitled to be released on bail and gives an undertaking that he shall comply with such directions as may be given by the Court]:

[Provided also that no person shall, if the offence alleged to have been committed by him is punishable with death, imprisonment for life, or imprisonment for seven years or more, be released on bail by the Court under this sub-section without giving an opportunity of hearing to the Public Prosecutor.]

(2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but that there are sufficient grounds for further inquiry into his guilt, subject to the provisions of section 446A and pending such inquiry, be released on bail, or, at the discretion of such officer or Court on the execution by him of a bond without sureties for his appearance as hereinafter provided.

(3) When a person accused or suspected of the commission of an offence punishable with imprisonment which may extend to seven years or more or of an offence under Chapter VI, Chapter XVI, or

Chapter XVII or more or conspiracy or attempt to commit, any such offence, is released on bail under sub-section (1) the Court shall impose the condition:-

- (a) that such person shall attend in accordance with the conditions of the bond executed under this chapter,
- (b) that such person shall not commit an offence similar to the offence of which he is accused or suspected, of the commission of which he is suspected, and
- (c) that such person shall not directly or indirectly make any inducement, threat or promise to any person acquainted with the facts of the case or to any police officer or tamper with the evidence,

and may also impose, in the interests of justice, such other conditions as it considers necessary or otherwise in the interests of justice.

(4) An officer or a Court releasing any person on bail under sub-section (1), or sub-section (2), shall record in writing his or its reasons or special reasons for so doing.

(5) Any Court which has released a person on bail under sub-section (1), or sub-section (2), may, if it considers it necessary so to do, direct that such person be arrested and commit him to custody.

(6) If, in any case triable by a Magistrate, the trial of a person accused of any non-bailable offence is not concluded within a period of sixty days from the first date fixed for taking evidence in the case, such person shall, if he is in custody during the whole of the said period, be released on bail to the satisfaction of the Magistrate, unless for reasons to be recorded in writing, the Magistrate otherwise directs.

(7) If, at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of any such offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.

439: SPECIAL POWERS OF HIGH COURT OR SESSIONS COURT REGARDING BAIL:-

- (1) A High Court or Court of Session may direct –
 - (a) that any person accused of an offence and in custody be released on bail, and if the offence is of the nature specified in sub-section (3) of Section 437, may impose any condition which it considers necessary for the purposes mentioned in that sub-section.
 - (b) that any condition imposed by a Magistrate when releasing any person on bail be set aside or modified :

Provided that the High Court or the Court of Session shall before granting bail to a person who is accused of an offence which is triable exclusively by the Court of Session or which, though not so triable, is punishable with imprisonment for life, give notice of the application for bail to the public prosecutor unless it is, for reasons to be recorded in writing, of opinion that it is not practicable to give such notice

(2) A High Court or Court of Session may direct that any person who has been released on bail under this Chapter be arrested and commit him to custody.

A bare reading of the language of sections 437 (5) and 439 (2) of the Cr.P.C. show that these sections provide for taking the accused back into custody, if the court which granted bail under section 437 considers it necessary so to do, or the High court or the sessions court considers it appropriate. If the court; which had granted bail; happens to be other than the High Court and the Sessions Court, then to take such a person in custody again; such court has to be of opinion that it is 'necessary' to do so. But in case of High Court and the Sessions Court passing such an order, even that requirement; of the taking such accused again in custody being 'necessary'; has been done away with by the statute. In that case; the High Court and the Session Court would be required to exercise their discretion according to; but not limited to; the general judicial principles for exercise of discretion. If bail granted to such an accused is sought to be cancelled, then the courts may apply the well settled criteria for this purpose, like assessing misuse of the concession of bail by the accused, or the order of granting bail itself being perverse. Still further, these courts may; otherwise also; order the accused being taken into custody, for any other appropriate reason. The addition of serious offences; after the accused was earlier granted bail; can be one such reason. This has been well clarified by the Hon'ble Supreme Court in **2019(3) RCR(Criminal) 538, Pradeep Ram Versus State of Jharkhand & Anr.** as under:-

17. This Court in *Hamida v. Rashid alias Rasheed and Others, (2008) 1 SCC 474* held that an accused after addition of serious non-cognizable offence is required to surrender and apply for

bail for newly added offences. It is, thus, clear that the bail granted to an accused earlier to addition of new non-bailable offence shall not ensure to the benefit of the accused insofar as newly added offences are concerned and he is required to surrender and obtain a bail with regard to newly added offences to save him from arrest.

21. Both Sections 437(5) and 439(2) empowers the Court to arrest an accused and commit him to custody, who has been released on bail under Chapter XXXIII. There may be numerous grounds for exercise of power under Sections 437(5) and 439(2). The principles and grounds for cancelling a bail are well settled, but in the present case, we are concerned only with one aspect of the matter, i.e., a case where after accused has been granted the bail, new and serious offences are added in the case. A person against whom serious offences have been added, who is already on bail can very well be directed to be arrested and committed to custody by the Court in exercise of power under Sections 437(5) and 439(2). Cancelling the bail granted to an accused and directing him to arrest and taken into custody can be one course of the action, which can be adopted while exercising power under Sections 437(5) and 439(2), but there may be cases where without cancelling the bail granted to an accused, on relevant consideration, Court can direct the accused to be arrested and committed to custody. The addition of serious offences is one of such circumstances, under which the Court can direct the accused to be arrested and committed to custody despite the bail

having been granted with regard to the offences with which he was charged at the time when bail was considered and granted.

29. In view of the foregoing discussions, we arrive at following conclusions in respect of a circumstance where after grant of bail to an accused, further cognizable and non-bailable offences are added:-

(i) The accused can surrender and apply for bail for newly added cognizable and non-bailable offences. In event of refusal of bail, the accused can certainly be arrested.

(ii) The investigating agency can seek order from the court under section 437(5) or 439(2) of Cr.P.C., 1973 for arrest of the accused and his custody.

(iii) The Court, in exercise of power under section 437(5) or 439(2) of Cr.P.C., 1973 can direct for taking into custody the accused who has already been granted bail after cancellation of his bail. The Court in exercise of power under Section 437(5) as well as Section 439(2) can direct the person who has already been granted bail to be arrested and commit him to custody on addition of graver and non-cognizable offences which may not be necessary always with order of cancelling of earlier bail.

(iv) In a case where an accused has already been granted bail, the investigating authority on addition of an offence or offences may not proceed to arrest the accused, but for arresting the accused on such addition of offence or offences it need to obtain an order to arrest the accused from the Court which had granted the bail.

Otherwise also; if any order of grant of bail can be set aside or withdrawn; due to the same being perverse or not being based on correct disclosures or facts; and such an accused can be ordered to be taken into custody, then there is no reason why an accused granted default bail under section 167(2) Cr.P.C.; cannot be taken into custody on filing of report by investigating agency under section 173 or equivalent provision. After all, the default bail under section 167(2) Cr.P.C. is granted only due to lack of proper facts with the court - because the investigating agency were not able to put the complete facts qua the alleged involvement of such accused before the court within specified time, whereas, filing the report under section 173 Cr.P.C. or equivalent provision; is nothing but putting before the court the entire facts showing the alleged involvement of the said accused in the alleged crime. Hence, after applying its mind to the report filed by the investigating agency under section 173 Cr.P.C., if the court finds the accused not being entitled to bail on merits of the case; or finds it necessary or appropriate to order the accused being taken into custody, then *per se* no fault could be found with such an order of the court.

Having considered general arguments on fate of default bail granted under section 167(2) Cr.P.C. and regarding grant of bail to the accused, the stage is now set for consideration of grant of bail, particularly, to the petitioner, and with the reference to the provisions and the offences under the New Companies Act 2013. However, before proceeding further, it would be appropriate to have a reference to the relevant provisions of the new Companies Act 2013, governing investigation, bail and the trial, which are as reproduced hereinbelow:-

investigate into the affairs of a company,—

- (a) on the receipt of a report of the Registrar or inspector under section 208;
- (b) on intimation of a special resolution passed by a company that the affairs of the company ought to be investigated; or
- (c) in public interest,

it may order an investigation into the affairs of the company.

(2) Where an order is passed by a court or the Tribunal in any proceedings before it that the affairs of a company ought to be investigated, the Central Government shall order an investigation into the affairs of that company.

(3) For the purposes of this section, the Central Government may appoint one or more persons as inspectors to investigate into the affairs of the company and to report thereon in such manner as the Central Government may direct.

Section 212: Investigation into affairs of Company by Serious Fraud Investigation Office.—(1) Without prejudice to the provisions of Section 210, where the Central Government is of the opinion, that it is necessary to investigate into the affairs of a company by the Serious Fraud Investigation Office:-

- (a) on receipt of a report of the Registrar or inspector under section 208;
- (b) on intimation of a special resolution passed by a company that its affairs are required to be investigated;
- (c) in the public interest; or
- (d) on request from any Department of the Central Government or a State Government,

the Central Government may, by order, assign the investigation into the affairs of the said company to the Serious Fraud Investigation Office and its Director, may designate such number of inspectors, as he may consider necessary for the purpose of such investigation.

(2) Where any case has been assigned by the central government to the serious fraud investigation office for investigation under this act, no other investigating agency of central government or any state government shall proceed with investigation in such case in respect of any offence under this act and in case any such investigation has already been initiated, it shall not be proceeded further with and the concerned agency shall transfer the relevant documents and records in respect of such offences under this act to serious fraud investigation office.

(3) Where the investigation into the affairs of a company has been assigned by the Central Government to Serious Fraud Investigation Office, it shall conduct the investigation in the manner and follow the procedure provided in this Chapter; and submit its report to the Central Government within such period as may be specified in the order.

(4) The Director, Serious Fraud Investigation Office shall cause

the affairs of the company to be investigated by an Investigating Officer who shall have the power of the inspector under section 217.

(5) The company and its officers and employees, who are or have been in employment of the company shall be responsible to provide all information, explanation, documents and assistance to the Investigating Officer as he may require for conduct of the investigation.

(6) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, (2 of 1974) (offences covered under section 447) of this Act shall be cognizable and no person accused of any offence under those sections 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 referred to this sub-section except upon a complaint in writing made by:-

- (i) the Director, Serious Fraud Investigation Office; or
- (ii) any officer of the Central Government authorised, by a general or special order in writing in this behalf by that Government.

(7) The limitation on granting of bail specified in sub-section (6) is in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail.

(8) If the Director, Additional Director or Assistant Director of Serious Fraud Investigation Office authorised in this behalf by the Central Government by general or special order, has on the basis of material in his possession reason to believe (the reason for such belief to be recorded in writing) that any person has been guilty of any offence punishable under sections referred to in sub-section (6), he may arrest such person and shall, as soon as may be, inform him of the grounds for such arrest.

(9) The Director, Additional Director or Assistant Director of Serious Fraud Investigation Office shall, immediately after arrest of such person under sub-section (8), forward a copy of the order, along with the material in his possession, referred to in that sub-section, to the Serious Fraud Investigation Office in a sealed envelope, in such manner as may be prescribed and the Serious Fraud Investigation Office shall keep such order and material for such period as may be prescribed.

(10) Every person arrested under sub-section (8) shall within twenty-four hours, be taken to a Judicial Magistrate or a Metropolitan Magistrate, as the case may be, having jurisdiction:

Provided that the period of twenty-four hours shall exclude the time necessary for the journey from the place of arrest to the Magistrate's court.

(11) The Central Government if so directs, the Serious Fraud Investigation Office shall submit an interim report to the Central Government.

(12) On completion of the investigation, the Serious Fraud Investigation Office shall submit the investigation report to the Central Government.

(13) Notwithstanding anything contained in this Act or in any other law for the time being in force, a copy of the investigation report may be obtained by any person concerned by making an application in this regard to the court.

(14) On receipt of the investigation report, the Central Government may, after examination of the report (and after taking such legal advice, as it may think fit), direct the Serious Fraud Investigation Office to initiate prosecution against the company and its officers or employees, who are or have been in employment of the company or any other person directly or indirectly connected with the affairs of the company.

(15) Notwithstanding anything contained in this Act or in any other law for the time being in force, the investigation report filed with the Special Court for framing of charges shall be deemed to be a report filed by a police officer under section 173 of the Code of Criminal Procedure, 1973.

(16) Notwithstanding anything contained in this Act, any investigation or other action taken or initiated by Serious Fraud Investigation Office under the provisions of the Companies Act, 1956 shall continue to be proceeded with under that Act as if this Act had not been passed.

(17) (a) In case Serious Fraud Investigation Office has been investigating any offence under this Act, any other investigating agency, State Government, police authority, income-tax authorities having any information or documents in respect of such offence shall provide all such information or documents available with it to the Serious Fraud Investigation Office;

(b) The Serious Fraud Investigation Office shall share any information or documents available with it, with any investigating agency, State Government, police authority or income tax authorities, which may be relevant or useful for such investigating agency, State Government, police authority or income-tax authorities in respect of any offence or matter being investigated or examined by it under any other law.

217. Procedure, powers etc., of inspectors.- (1) It shall be the duty of all officers and other employees and agents including the former officers, employees and agents of a company which is under investigation in accordance with the provisions contained in this Chapter, and where the affairs of any other body corporate or a person are investigated under section 219, of all officers and other employees and agents including former officers, employees and agents of such body corporate or a person-

(a) to preserve and to produce to an inspector or any person authorised by him in this behalf all books and papers of, or relating to, the company or, as the case may be,

relating to the other body corporate or the person, which are in their custody or power; and

- (b) otherwise to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.

(2) The inspector may require any body corporate, other than a body corporate referred to in sub-section (1), to furnish such information to, or produce such books and papers before him or any person authorised by him in this behalf as he may consider necessary, if the furnishing of such information or the production of such books and papers is relevant or necessary for the purposes of his investigation.

(3) The inspector shall not keep in his custody any books and papers produced under sub-section (1) or sub-section (2) for more than one hundred and eighty days and return the same to the company, body corporate, firm or individual by whom or on whose behalf the books and papers were produced:

Provided that the books and papers may be called for by the inspector if they are needed again for a further period of one hundred and eighty days by an order in writing.

(4) An inspector may examine on oath-

- (a) any of the persons referred to in sub-section (1); and
- (b) with the prior approval of the Central Government, any other person, in relation to the affairs of the company, or other body corporate or person, as the case may be, and for that purpose may require any of those persons to appear before him personally:

Provided that in case of an investigation under section 212, the prior approval of Director, Serious Fraud Investigation Office shall be sufficient under clause (b).

(5) Notwithstanding anything contained in any other law for the time being in force or in any contract to the contrary, the inspector, being an officer of the Central Government, making an investigation under this Chapter shall have all the powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit in respect of the following matters, namely:-

- (a) the discovery and production of books of account and other documents, at such place and time as may be specified by such person;
- (b) summoning and enforcing the attendance of persons and examining them on oath; and
- (c) inspection of any books, registers and other documents of the company at any place.

(6) (i) If any director or officer of the company disobeys the direction issued by the Registrar or the inspector under this section, the director or the officer shall be punishable with imprisonment which may extend to one year and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh

rupees.

(ii) If a director or an officer of the company has been convicted of an offence under this section, the director or the officer shall, on and from the date on which he is so convicted, be deemed to have vacated his office as such and on such vacation of office, shall be disqualified from holding an office in any company.

(7) The notes of any examination under sub-section (4) shall be taken down in writing and shall be read over to, or by, and signed by, the person examined, and may thereafter be used in evidence against him.

(8) If any person fails without reasonable cause or refuses-

(a) to produce to an inspector or any person authorised by him in this behalf any book or paper which is his duty under sub-section (1) or sub-section (2) to produce;

(b) to furnish any information which is his duty under sub-section (2) to furnish;

(c) to appear before the inspector personally when required to do so under sub-section (4) or to answer any question which is put to him by the inspector in pursuance of that sub-section; or

(d) to sign the notes of any examination referred to in sub-section (7), he shall be punishable with imprisonment for a term which may extend to six months and with fine which shall not be less than twenty-five thousand rupees but which may extend to one lakh rupees, and also with a further fine which may extend to two thousand rupees for every day after the first during which the failure or refusal continues.

(9) The officers of the Central Government, State Government, police or statutory authority shall provide assistance to the inspector for the purpose of inspection, inquiry or investigation, which the inspector may, with the prior approval of the Central Government, require.

(10) The Central Government may enter into an agreement with the Government of a foreign State for reciprocal arrangements to assist in any inspection, inquiry or investigation under this Act or under the corresponding law in force in that State and may, by notification, render the application of this Chapter in relation to a foreign State with which reciprocal arrangements have been made subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the agreement with that State.

(11) Notwithstanding anything contained in this Act or in the Code of Criminal Procedure, 1973 (2 of 1974) if, in the course of an investigation into the affairs of the company, an application is made to the competent court in India by the inspector stating that evidence is, or may be, available in a country or place outside India, such court may issue a letter of request to a court or an authority in such country or place, competent to deal with such request, to examine orally, or otherwise, any person, supposed to be acquainted with the facts and circumstances of the case, to record his statement made in the course of such examination and also to require such person or any other person to produce any document or thing, which may be in his possession pertaining to the case, and to forward all the evidence so

taken or collected or the authenticated copies thereof or the things so collected to the court in India which had issued such letter of request:

Provided that the letter of request shall be transmitted in such manner as the Central Government may specify in this behalf:

Provided further that every statement recorded or document or thing received under this sub-section shall be deemed to be the evidence collected during the course of investigation.

(12) Upon receipt of a letter of request from a court or an authority in a country or place outside India, competent to issue such letter in that country or place for the examination of any person or production of any document or thing in relation to affairs of a company under investigation in that country or place, the Central Government may, if it thinks fit, forward such letter of request to the court concerned, which shall thereupon summon the person before it and record his statement or cause any document or thing to be produced, or send the letter to any inspector for investigation, who shall thereupon investigate into the affairs of company in the same manner as the affairs of a company are investigated under this Act and the inspector shall submit the report to such court within thirty days or such extended time as the court may allow for further action:

Provided that the evidence taken or collected under this sub-section or authenticated copies thereof or the things so collected shall be forwarded by the court, to the Central Government for transmission, in such manner as the Central Government may deem fit, to the court or the authority in country or place outside India which had issued the letter of request.

Section 219 Power of inspector to conduct investigation into affairs of related companies, etc. - If an inspector appointed under section 210 or section 212 or section 213 to investigate into the affairs of a company considers it necessary for the purposes of the investigation, to investigate also the affairs of-

- (a) any other body corporate which is, or has at any relevant time been the company's subsidiary company or holding company, or a subsidiary company of its holding company;
- (b) any other body corporate which is, or has at any relevant time been managed by any person as managing director or as manager, who is, or was, at the relevant time, the managing director or the manager of the company;
- (c) any other body corporate whose Board of Directors comprises nominees of the company or is accustomed to act in accordance with the directions or instructions of the company or any of its directors; or
- (d) any person who is or has at any relevant time been the company's managing director or manager or employee,

he shall, subject to the prior approval of the Central Government, investigate into and report on the affairs of the other body corporate or

of the managing director or manager, in so far as he considers that the results of his investigation are relevant to the investigation of the affairs of the company for which he is appointed.

Section 229: Penalty for furnishing false statement, mutilation, destruction of documents-

Where a person who is required to provide an explanation or make a statement during the course of inspection, inquiry or investigation, or an officer or other employee of a company or other body corporate which is also under investigation,

- (a) destroys, mutilates or falsifies, or conceals or tampers or unauthorisedly removes, or is a party to the destruction, mutilation or falsification or concealment or tampering or unauthorised removal of, documents relating to the property, assets or affairs of the company or the body corporate;
- (b) makes, or is a party to the making of, a false entry in any document concerning the company or body corporate; or
- (c) provides an explanation which is false or which he knows to be false, he shall be punishable for fraud in the manner as provided in section 447.

SECTION 436. OFFENCES TRIABLE BY SPECIAL COURTS:-

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974):

- (a) all offences specified under sub-section (1) of section 435 shall be triable only by the Special Court established for the area in which the registered office of the company in relation to which the offence is committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the High Court concerned;
- (b) where a person accused of, or suspected of the commission of, an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that where such Magistrate considers that the detention of such person upon or before the expiry of the period of detention is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

- (c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974) in relation to an accused person who has been

forwarded to him under that section; and

(d) a Special Court may, upon perusal of the police report of the facts constituting an offence under this Act or upon a complaint in that behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974) be charged at the same trial.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years:

Provided that in the case of any conviction in a summary trial, no sentence of imprisonment for a term exceeding one year shall be passed:

Provided further that when at the commencement of, or in the course of, a summary trial, it appears to the Special Court that the nature of the case is such that the sentence of imprisonment for a term exceeding one year may have to be passed or that it is, for any other reason, undesirable to try the case summarily, the Special Court shall, after hearing the parties, record an order to that effect and thereafter recall any witnesses who may have been examined and proceed to hear or rehear the case in accordance with the procedure for the regular trial.

Section 438: Application of Code to proceedings before Special Court.- Save as otherwise provided in this Act, the provisions of the Code of Criminal Procedure 1973 (2 of 1974), shall apply to the proceedings before a Special Court and for the purposes of the said provisions, the Special Court shall be deemed to be a Court of Session and the person conducting a prosecution before a Special Court shall be deemed to be a Public Prosecutor.

Section 446-A: The Court or the Special Court while deciding the amount of fine or imprisonment under this Act, shall have due regard to the following factors, namely:-

- (a) Size of the company;
- (b) nature of business carried on by the company;
- (c) injury to public interest ;
- (d) nature of the default ; and
- (e) repetition of the default.

Section 447: Punishment for fraud:- Without prejudice to any liability including repayment of any debt under this Act or any other law for the time being in force, any person who is found to be guilty of fraud, shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to ten years and shall also be liable to fine which shall not be less than the amount involved in the fraud, but which may extend to three times the amount involved in the fraud:

Provided that where the fraud in question involves public interest, the term of imprisonment shall not be less than three years.

Provided further that where the fraud involves an amount less than ten lakh rupees or one per cent of the turnover of the company, whichever is lower, and does not involve public interest, any person guilty of such fraud shall be punishable with imprisonment for a term which may extend to five years or with fine which may extend to twenty lakh rupees or with both.

Explanation:- For the purposes of this section-

- (i) “fraud” in relation to affairs of a company or anybody corporate, includes any act, omission, concealment of any fact or abuse of position committed by any person or any other person with the connivance in any manner, with intent to deceive, to gain undue advantage from, or to injure the interests of, the company or its shareholders or its creditors or any other person, whether or not there is any wrongful gain or wrongful loss;
- (ii) “wrongful gain” means the gain by unlawful means of property to which the person gaining is not legally entitled;
- (iii) “wrongful loss ” means the loss by unlawful means of property to which the person losing is legally entitled;”

A cursory perusal of the above-said provisions shows that that once the serious fraud investigation is handed over to the special agency constituted under the Companies Act, then the investigation officer of SFIO has the power to arrest the accused. However, as per section 212(10) above; the arrested accused is required to be produced before the Magistrate within 24 hours. Still further, the investigation has to be completed as per the provisions of the Companies Act, as supplemented by general provisions of the Cr.P.C. The investigating officer has been given powers of civil court for certain purposes and also; he has been conferred with the power to record the statement of persons on oath; which has been prescribed to be admissible in evidence against the person making it. The trial is prescribed to be conducted by the Special Court constituted for this purpose and in

of the Companies Act. Still further, if the investigation is not completed within the statutory period then the Magistrate under section 167(2) Cr.P.C. or the Special Court; exercising powers of magistrate; as provided under section 436 of the Companies Act; can grant the default bail to the accused. There are provisions which would affect consideration of bail to the accused by the Special Court.

It would also be appropriate to point out at this stage that there are lot many other provisions in the Companies Act which make various Acts, omissions, non-filing, non-disclosure, not keeping proper records and other defaults and defects qua affairs of a Company as punishable, although with smaller quantum of punishments of imprisonment and/or fine. These provisions are strewn with throughout the body of the Act. To inspect the records of Companies and to investigate these minor offences, the Central Government is to appoint 'Inspectors' of Companies, who shall work as the ordinary Inspectors to investigate the said firms. The investigation, under the Companies Act can be initiated in three different manners and for different reasons, which might come to the knowledge of the Central Government. If during routine inspection something criminal comes to the knowledge of Inspectors, on that the investigation can be started under Section 208 of the Companies Act. If certain other misconduct or fraud in the affairs of a Company comes to the knowledge of the Central Government; and for the reasons mentioned therein, the Central Government can order investigation under Section 210 of the Companies Act. Still further, if during some proceedings some default or even fraudulent affairs in relation to the conduct of affairs of the company comes to the knowledge of the Company Tribunal then under Section 213, the

Tribunal can require the investigation. However, all these investigations, ordered by the Government under Sections 208 or 210 or ordered by the Tribunal under Section 213, are to be conducted by ordinary Inspector of Companies. But 'serious frauds' in relation to affairs of companies have been carved out as separate and distinct category for their investigation and punishment. For investigating serious frauds a separate investigating agency, called 'Serious Fraud Investigation Office' has been provided under Section 211 of the Companies Act. The investigation in serious frauds is to be ordered by Central Government under Section 212 of the Companies Act and is to be carried out by SFIO. This investigation is not to be carried out by ordinary Inspectors of Companies, but is to be carried out by the Director, Additional Director or other Officers of SFIO, authorized by the Director SFIO. However, the person carrying out the investigation under SFIO is also given a deeming fiction of being an 'Inspector' for the purpose of powers of Investigating Officer; defined under Section 217 of the Companies Act. Hence all the Investigating Officers, whether investigating at the instance of Central Government under Section 208 or Section 210 or acting at the instance of Tribunal under Section 213 or acting at the instance of SFIO under Section 212, are to be known as 'Inspector' and are to conduct investigation as per procedure prescribed under Section 217. But Officer of SFIO, authorized to conduct investigation under Section 212; is further bound by the restrictions and prohibitions as prescribed under Section 212 of Companies Act as well. One more fact which comes out is that if an investigation is ordered by the Central Government, whether under Sections 208, 210, 213 or 212, and in the process the affairs of some other subsidiary or controlled company of the company under investigation are

also found worth investigation, then even for the investigation of the affairs

of subsidiary or controlled company; a separate approval from the Central Government is required and the same is to be granted by the Government, as required under Section 219 of the Companies Act. Again, whether it is the investigation originally initiated under Section 208, 210, 212 or 213 or approved additionally under Section 219, all have to be conducted under the procedure given under Section 217 of Companies Act; additionally controlled by restrictive provisions of Section 212 for officers of SFIO.

Under Section 217, when an investigation Officer feels the need to join any person or other body corporate in investigation qua the affairs of the company which he is already authorised to investigate, then under Section 217(2) he can seek record from such any other person or body corporate, as he considers relevant for the purpose of his investigation. Under Section 217(4) he can also record the statement on Oath, of the Officers and employees etc of the Company under investigation. Additionally he can also record statement on Oath of any other person or body corporate, which is not directly connected with, or controlled by the Company under investigation. At this stage of investigation, the provisions of Section 217(4) make a distinction between the ordinary Inspector of Companies, investigating as per the mandate of Sections 208, 210 and 213 on the one hand; and the Officer of SFIO investigating the serious fraud as per the mandate of Section 212 on the other hand. If a statement on Oath is to be recorded, of a person who is officer or employee etc., of the Company under investigation, then Ordinary Inspector and Officer of SFIO, both are authorised to record the same under provision of Section 217(4)(a), being a person already covered by Section 217(1). But if the statement of any other person, who is not the employee or Officer etc. of the Company under

investigation, is to be recorded on Oath then under provisions of Section 217 (4) (b) the ordinary Inspector of Companies shall be required to obtain prior approval from the Central Government. However, if the Officer of the SFIO, investigating the case under approval granted under Section 212 is to record statement on Oath; of a person who is not connected with the management and control of the affairs of the Company under investigation as employee or officer etc., then as per the proviso to Section 217(4)(b) he shall require approval only from the Director SFIO, instead of the Central Govt. This distinction has been made by the statute keeping in view the specialized function of SFIO and nature of the offences; which SFIO is required to investigate. Reason for prescribing condition of requiring approval only from Director, SFIO is because, originally, the investigation is entrusted by the Central Government under Section 212 to SFIO only and not to any Inspector. The Inspector is specified, further, only by the SFIO. Hence, being delegate of Director, SFIO, the Inspector requires prior approval only from the Director, SFIO under Section 217(4)(b) proviso. In the present case the approval from the Director SFIO has been obtained by the investigation officer. Therefore, there is nothing wrong with joining the petitioner also qua the investigation of affairs of the Companies of the Adarsh Group. Since, as per the provisions of Section 212 (14), on receipt of investigation report the Central Government can order initiation of prosecution; not only against the officers and employees etc. of the Company under investigation; but also against 'any person' directly or indirectly connected with affairs of the company under investigation as well.

substance in the argument of Id. Counsel for the SFIO that in the present case, the petitioner was granted default bail by the court at the initial stage, when investigation could not be completed in prescribed time and therefore; not much material was placed before the court. When charge-sheet has finally been filed against the petitioner he has been found to be involved in the acts of frauds on multiple counts and qua multiple companies; which were not even in the knowledge of the investigating officer at the time when he had arrested the petitioner in the first instance or when he was granted default bail by the trial court. Altogether new offences on multiple counts are now alleged against the petitioner and the allegations against him are now supported by the, alleged, plethora of evidence. Therefore, on appreciation of this entire material qua involvement in newly alleged and multiple offences of serious nature the trial court has been of the prima facie view that the petitioner has committed serious offences and hence not entitled to bail on merits; and therefore; deserves to taken into custody for the purpose of proper and smooth conduct of trial. This court does not find any illegality or impropriety with the order passed by the court below, whereby the bail granted to the petitioner has been cancelled. Although Id. Counsel has argued that the petitioner was already arrested for the offence under section 447 of Companies Act, therefore nothing new has come on record, however it deserves to be mentioned that even if the charge has to be only under section 447 of the Companies Act, then also he shall now be required to be separately charged under this section; multiple times; for alleged frauds with or involving different CUIs of Adarsh Group and his own companies, giving details of different frauds separately; as per the claim of the prosecution. The multiple charges under section 447 of the

involving several companies and their independent affairs; but in the same continuous process of swindling the money of the Cooperative Society (ACCSL). All these alleged offences have common origin, interlinked steps, interwoven processes and the same end-product in the form of frauds qua the funds of the Cooperative Society (ACCSL). Hence, all the charges under section 447 on multiple counts; can be very well be tried together and can be pleaded by the prosecution to get the bail granted to the petitioner cancelled on the ground that more and new offences have been added after the petitioner was earlier granted the default bail. Hence; the default bail cannot act as a permanent shield for him qua those alleged frauds which were not even knowledge of the investigating officer at the time of the arrest of the petitioner. Hence the bail granted to the petitioner under section 167(2) has rightly been cancelled by the trial court.

After cancellation of default bail the trial court was required to advert to the alleged material against the petitioner and the relevant provisions of law for consideration of grant of regular bail to the petitioner. Same is required to be done by this court as well.

Although Id. Counsel for the SFIO has insisted upon the applicability of twin conditions prescribed under section 212(6) of the New Companies Act, 2013 for denying bail to the petitioner, as has also been done by the court below. However, this court does not find any substance in the argument of the learned Counsel for the SFIO that the twin conditions prescribed under section 212(6) of the New Companies Act, 2013 start with negation of bail to the accused and the court could grant bail to such an accused only if the court records a satisfaction qua the accused being ‘not

the accused is not likely to commit any similar offence again. Also this court does not find substance in the insistence of the learned counsel for the SFIO that the application of the twin conditions, as prescribed under Section 212 (6), are mandatory and have to be applied to all the considerations of grant of bail to the accused facing charge covered by section 447 of the New Companies Act, 2013. No doubt the statutory language of section 212 (6) has prescribed the twin conditions to be considered by the court, in case the prosecutor raises his objection to the grant of bail, however a similar language existing in the Prevention of Money Laundering Act, which was *para materia* to the language of the twin conditions contained in section 212(6) of the new Companies Act, had earlier come-up for consideration of the Supreme Courts in case of **Nikesh Tarachand Shah (Supra)** case and such language has already been declared to be *ultra vires* by the Supreme Court in that case. Not only this, even this court had an occasion of considering the nature and scope and the operational functionality of the language of these twin conditions, as contained in the Narcotic Drugs and Psychotropic Substances Act, in case of **Ankush Kumar (supra)**. After threadbare analyzing the operational functionality of the language of the twin conditions, as used in the statute, this court had come to conclusion that the language of the twin conditions requires impossibility from the court, besides defying the human logic in its operational functionality. This language, if made operational in a case, even by adopting the semi-cooked concept of 'reading down' the language - and thereby ignoring the celebrated 'Doctrine of Severability' and the touchstone of Articles 14 & 21; both, qua test of constitutional validity, then also it turns on their head some well established principles of criminal

dealing with the further progress of the trial in a criminal case, besides requiring prophesy from the court, which by no means, is a job of a criminal court. Hence this court had held in case of **Ankush Kumar(supra)**, that since the operational functionality of the language of twin conditions is based upon totally indeterminate criteria which are required for exercise of this power by the court; and also expects the impossible from the court, therefore, the language of these twin conditions is in direct conflict with the rights of an individual guaranteed by Article 14, which protects him from irrationality and arbitrariness in application of law against him, as well, his right to life and liberty protected by Article 21 of the Constitution of India. In case of conflict between the rights guaranteed by the Articles 14 & 21 of the Constitution on one hand and the language in a statute on the other hand, the latter has to give in to the former. This has also been so held by the Supreme Court in another case where the Supreme Court has held that despite prohibition of suspension of sentence under NDPS Act, the Courts can suspend the sentence. Hence it was held by this court that, despite the fact that the constitutional *vires* of the language of the twin conditions might be considered by some other court in some other appropriate proceedings, the state could not be permitted to take the twin conditions as an objection to the grant of the bail to the accused. This court does not find any reason to take a different view now. This judgment of this court was even challenged before the Hon'ble Supreme Court in case of **SLP(Criminal) Diary No. 42609 of 2018, State of Punjab V/s Ankush Kumar @ Sonu**. However, the Hon'ble Supreme Court had not found any reason to interfere with that judgment of this court; and SLP was, accordingly, dismissed by the Supreme Court. It would not be appropriate to

lest the essence of the matter should be lost in the process. Rather to truly appreciate the matter of the operational functionality of the twin conditions; the said judgment has to be read as an organic whole. Since the said judgment is reported one, thus, the reasoning given in that judgment can be taken as a supplement to the decision of the present case as well.

Although the learned Counsel for the SFIO has, additionally, referred to the language used in Section 437 of Cr.P.C to argue that a similar language is already used in the said provision of bail; and has also relied upon the judgment of the Supreme Court rendered in **Kartar Singh V/s State of Punjab, 1994 (3) SCC 569**, wherein referring to the language of section 437 Cr.P.C. the *para materia* language of twin conditions used in Terrorist and Disruptive Activities Act was upheld. However, although this court has no competence to comment upon this judgment of the Supreme Court, yet it has to be noted that the same judgment was cited even before the Supreme Court in **Nikesh Tarachand Shah (Supra)** case and the Hon'ble Supreme Court had not found it worth reliance to the extent of being sufficient for upholding the *para-materia* language of twin conditions used in the Prevention of Money Laundering Act. Beyond that; this court can only observe that any further relevance of this judgment can be assessed only by the Hon'ble Supreme Court in the case which is now stated to be pending before the Supreme Court itself and in which the constitutional validity of twin conditions as prescribed under section 212(6) is directly under challenge. However, so far as the language of section 437 Cr.P.C. is concerned, although in itself that cannot be a ground for pleading constitutional validity of the section 212(6) of the Companies Act, yet otherwise also; that language is drastically different than the language used

in section 212(6) of Companies Act. A bare perusal of this section shows that the section 437 Cr.P.C. uses two different phrases, qua satisfaction of the court for releasing an accused on bail, at two drastically different stages of the trial. Section 437(1)(i) is dealing with a stage when an accused appears or brought before the trial court for the first time to start proceedings against him. This provision, for declining bail to such a person; requires the satisfaction and belief of the court that the said person 'has been guilty' of the offence mentioned in that provision. On the other hand Section 437(7) deals with a situation where the trial stands concluded but the decision is not yet pronounced. In this Situation; this provision provides that the accused need not be unnecessarily incarcerated and he can be released on bail if the court has a satisfaction and belief; on the basis of the evidence of the prosecution; that the accused 'is not guilty' of the offence. Both these provisions are perfectly in tandem with the other provisions of Cr.P.C. relating to the stages and progress of trial, like framing of charge, discharge and acquittal of an accused as per the progress of trial and availability of evidence on record. On the other hand, section 212(6) of the Companies Act requires from the court; at the start of the trial itself; what section 437(7) requires from the court at the end of the trial. Even if, by hook or crook, the court manages to record, while granting bail to an accused, as is required under section 212(6), that the accused 'is not guilty', then it negates the entire process of further trial of that accused. It goes against framing of the charge by the same court and it may require even discharge of such an accused; because by recording a satisfaction that a person 'is not guilty' the court surpasses the level of satisfaction required for framing charge itself; and goes near to recording the satisfaction

Similarly, holding the twin conditions to be mandatorily followed in all situations for release of an accused on bail; can lead the court to hit against the wall in a given situation. This can be clear from another inconvenient question, which has not been shown by the learned Counsel for the SFIO to have been answered by any court so far, including the Hon'ble Supreme Court. The question is - for how long an accused can be kept in custody on the basis of non-fulfillment of the requirement prescribed under section 212(6). This question was specifically referred to Delhi High Court by way of reference by a judicial officer, in case of **Court on its Own Motion (Supra)** case. However, even there the question does not find any answer. Unless this question is categorically answered to say that till the conclusion of the trial such a person cannot be released on bail without satisfying the conditions mentioned in section 212(6), the twin condition cannot be held to be mandatory. This is so because if a person can be released on bail without satisfying the twin conditions of the section 212(6), say, after 3 years, then there is no reason why he cannot be released without complying the said twin condition today itself. But this court has come across the unfortunate situations where a court may not even find the moral courage or the legal sanctity to tell to the accused that he shall have to wait in custody till conclusion of the trial, despite and in face of the legislative policy contained in provisions of section 436A of the Cr.P.C. If an accused is in custody for years together without his fault and without any effective proceedings being conducted against him, this may turn into a totally unfair procedure, which cannot be used to curtail the liberty of an accused in violation of Article 21 of the Constitution of India. And in our system of criminal adjudication these situations are not uncommon. In fact,

police officers into custody and keeping them in custody till their examination and cross-examination before the trial court, as prosecution witnesses, was completed, because in those cases only the police persons were the witnesses and they were not appearing before the trial court, for 19 dates in one case and for 41 dates in another case; despite the fact that the accused was in continuous custody or was regularly appearing before the trial court. Such kind of cases does galore. In such a situation the court would do substantial justice; or would stick to the conditions; like the ones prescribed under section 212(6); to deny even the bail to such an accused? Even if the courts are to stick to such condition; then how much injustice to the accused would be sufficient to off-set or to balance with the rigor of the twin condition? This court finds the answer to these inconvenient questions to be in negative and, therefore, constrained to observe that in humble view of this court; the twin conditions mentioned in section 212(6) are not mandatory in their compliance.

Although learned Counsel for the SFIO has submitted that in the case of **Nitin Johari (Supra)** the Hon'ble court has remanded the matter to the Delhi High Court for reconsideration on bail by considering the scope and effect of the twin conditions, as laid down in the section 212(6) of the Companies Act, however, this court finds that; in that case, the Hon'ble Supreme Court has also observed that even if conditions prescribed under section 212(6) are not to be followed, still the criteria meant for bail in cases of economic offences was required to be considered by the High Court of Delhi. Hence, the primary reason for remand in that case was that the High Court of Delhi had not considered the material on record of the case and had granted bail even without advertng to the factors considered

relevant by the Supreme Court for economic offences. Additionally, the Supreme Court had also directed the Delhi High Court to consider the 'scope and effect' of the twin conditions prescribed under section 212(6) of the Companies Act. However, in the present case, as mentioned above, this court has already considered the 'scope and effect' of the operational functionality of the language *para materia* to the one contained in the twin conditions, as prescribed under section 212(6) of the Companies Act and has found in the case of **Ankush Kumar (Supra)** that the languages is in conflict with the right of the accused guaranteed under Article 14 and Article 21 of the Constitution and thus has to give way to the fundamental rights of the accused; qua his consideration for grant of bail. That judgment of this court was even challenged before the Hon'ble Supreme Court in case of **SLP(Criminal) Diary No. 42609 of 2018, State of Punjab V/s Ankush Kumar @ Sonu**. However, the Hon'ble Supreme Court had not found any reason to interfere with that judgment of this court; and SLP was, accordingly, dismissed by the Supreme Court. Hence this court is of the view that bail to the petitioners cannot be denied only on the strength of insistence by the public prosecutor upon twin conditions, as prescribed under section 212(6) of the Companies Act.

However, this court finds substance in the argument of the learned Counsel for the SFIO that the offences involved in this case are the economic offences and therefore, the factors and the criteria laid down by the Supreme Court for consideration for granting bail in economic offences have to be considered by this court. The said criteria have found elucidation in several judgments of the Supreme Court. Even in case of **Nitin Johari (Supra)** the Supreme Court had emphasized the fact that in case of

consideration of bail to the accused in case of economic offences, the factors and criteria mentioned by the Supreme Court in case of **Y.S. Jagan Mohan Reddy (Supra)** are to be followed. Observation of the Hon'ble Supreme Court, as approvingly quoted in the case of **Nitin Johari (Supra)**, are as under:-

“**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.”

Therefore this court is under obligation to consider the nature of offence and the material placed on record before the special court, by way of charge-sheet against the petitioner, for consideration of question of granting bail to petitioner.

To discredit the concept of economic offences being a class

economic offences constituting a class apart has not been carried forward consistently even by the Supreme Court. He has also submitted that the Supreme Court has granted bail to the accused in cases involving economic offences. Not only this, the Supreme Court has granted bail to such accused even by writing that it was conscious of the fact that the offences involved in those cases were economic offences and that offences would have an adverse effect upon the economy as such. The counsel has relied upon the judgment in case of **Sanjay Chandra (Supra)** and in case of **D. K. Sethi (Supra)**. Therefore, it is submitted that applying the concept of economic offences selectively would tantamount to discrimination in application of law. Hence it is submitted by the Counsel for the petitioner and the distinction between ‘economic offences’ and the other offences; qua the consideration of bail to the accused; no more holds good. Saying otherwise would give an impression that the courts are adopting a different approach in case of rich and high-ups and a different approach qua ordinary mortals. However, for the purpose of this case this court finds the argument to be not relevant. This court finds that in a case relating to the same offences under the new Companies Act 2013 only, the Supreme Court of India, in case of **Nitin Johari (supra)** has specifically directed the High Court of Delhi to take into consideration the factors which are required to be considered for economic offences; for the purpose of consideration of bail to an accused. This court is under duty to adopt the same approach while considering the question of the bail to the petitioner. Any perceived inconsistency, if any, in the approach and in the judgments of the Supreme Court in this regard, can only be raised before and can be clarified only by the Hon’ble Supreme Court. So far as this court is concerned, it finds a clear-cut guidance in the

this regard. Otherwise also the fact that the offences under the new Companies Act, 2013 are the 'economic offences' and have to be treated a 'class apart' is clear from the provision of section 446A of the Companies Act itself. This section creates an extraordinary provision to bind-down the discretion of the Special Court even in the matter of award of punishment to the convict. This section has specifically made the nature, the scale and machinations of the offence and the fraud, size of the Company, Nature of the Business of the Company and the Injury to the Public Interest; to be the guiding factor to grade the quantum of the punishment to be awarded accused by the Court. Hence there is no doubt that the offences under the Companies Act constitute a class apart and these offences are prescribed by the Companies Act itself as to be treated as the serious economic offences.

So far as the seriousness of the offences and the material against the petitioner is concerned, this court finds weight in the arguments of the learned Assistant Solicitor General representing SFIO that there are serious allegations against the petitioner and there is enough material inculcating the petitioner in the offence. As per the allegations the petitioner and his companies have been instrumental in swindling of huge amounts out of total swindled amount of Rs.1700 Crores (Rs 4140 Crores including interest); which was, allegedly, swindled by the Adarsh Group of Companies through their subsidiaries and co-conspirators. The petitioner is alleged to be the pivotal person to commit the frauds upon the Cooperative Society and the CUIs of the Adarsh Group, as per the details mentioned in the foregoing paras. The charge-sheet against the petitioner is for multiple counts under section 447 of the Companies Act, which is a serious offence,

inviting punishment of imprisonment up to 10 years. Although the Counsel for the petitioner has submitted that the petitioner was already granted bail despite his alleged involvement in the offence under section 447 of the Companies Act, however, the fact remains that the petitioner has been charge-sheeted for offences under section 447 of the Companies Act, 2013 on multiple counts in the charge-sheet filed by the investigating agency.

Although the counsel has also submitted that the transactions alleged against the petitioner and income arising there-from is reflected in the bank accounts and in the income tax returns of the companies, however, this is only an argument in futility. The very allegation against the petitioner is that the petitioner and his companies colluded with other co-accused in getting created these artificial entries to route and adjust the cash and the money given to them and by creating and showing the entries of in the records of the companies; through cobweb of companies, of the transactions and of the entries. Therefore, the fake transaction to reflect in the tax record has been created. However, the fakeness of these entries and tax return transactions is exposed by the very fact that there are no records of any supporting agreements of loans or of the supporting documents in the 'Books of Account' of these companies, as claimed in the income tax returns.

Coming to the material against the petitioner, learned Counsel for the SFIO has pointed out that investigation has led to the seizure of the material and recovery of fudged entries and the data. The petitioner himself has also made admission regarding the said transaction and entries and the concerned data. Hence there is an admission on oath by the petitioner and also the admissions of the co-accused Peeyush Aggarwal, and others; who

have specifically stated that the petitioner had given them the cash and the amounts and that was given to other companies without any supporting documents. Hence, considering the entire material on record against the petitioner, by any means; it cannot be said that petitioner is not involved in the offences alleged against him.

Although the learned Counsel for the petitioner has submitted that the since the statement of the petitioner was recorded by the investigating officer who has powers akin to the police powers, therefore, the alleged admission by the petitioner has to be treated as a confession, which is not admissible under section 25 of the Evidence Act, however, this court does not find any substance in this argument. The Companies Act 2013 is a special statute. As per the provision contained in section 212(3) the investigation of the offences by the authorities under this Act has to be carried out only as per the provisions of this Act. Still further, under sections 435, 436 and section 439 the trial of an offender under this Act is to be conducted by the Special Court in accordance with Cr.P.C. and the procedure as modified under this Act. Section 217(7) specifically provides that the statement made by a person before the investigating officer shall be admissible against such person and can be used against him. The Companies Act is a special statute; therefore any provision specifically enacted under this Act shall have overriding effect over any other provision in any other general law, like Cr.P.C. and the Evidence Act, dealing with the same aspect. Otherwise also, to repose confidence in and to provide due protection to the corporate world, unlike the free-hand powers of the police qua arrest, search and seizure, the powers of the investigating officers under the Companies Act are far more controlled and circumscribed by the

conditions, restrictions and even the prohibitions under the relevant provisions of the Companies Act. Accordingly, under the Companies Act the investigating officer has also been conferred commensurate sanctity and his work has been conferred more authenticity as compared to that of the ordinary police officers. Therefore, under the provisions of the section 217(4) and section 217(5) Companies Act the investigating Officers has been given the power to record even the statements on oath and to summon person as the civil court does. The statement recorded by an authority having powers to record the statement on oath can never be put at par with the one recorded by an ordinary police officer. Such a statement recorded by the investigating officer under Companies Act, even if it is of 'admission' of certain fact; though could not be taken as sufficient for conviction on its own, however, the same would not be discarded as a 'confession' hit by section 25 of the evidence Act. As per the mandate of the section 217(7) of the Companies Act, this can certainly be relied upon as evidence against the petitioner. Therefore, the same can be considered for the purpose of bail as well. For the same reasons, even the statement of a co-accused would be relevant under section 10 of the Evidence Act, and the same can be relied upon under section 30 of the Evidence Act. Although, the question of reliance upon such statement as 'evidence' would come-up during the trial only after the same is 'proved', however, for the purpose of bail its 'relevance' as 'material' against the petitioner cannot be excluded at this stage. There is nothing on record that the prosecution shall not prove this statement during the trial or that it would be prohibited from proving the same during the trial. Although in the first blush it can occur to the mind that such provision; which makes the statement made before the

due to inbuilt possibility of pressure and coercion in making such statement, however, it deserves to be noted that the trial of an accused is only a mean to achieve the end i.e. to do substantial justice. The end-product of the criminal trial can very well be the total deprivation of the liberty of the accused. Therefore, some element of coercion is bound to creep-in in all the procedures of criminal trial. Although, even the means also have to be such which are not in conflict with the fundamental rights of the accused, however, all kinds of coercion and all the degrees of the same cannot be pleaded to be in conflict with the fundamental rights of the accused. Under the provisions of the section 212 and section 217 of the Companies Act a person, when joined into investigation, is bound to state only the truth. There are punishments and the penalties provided for making incorrect statements or for furnishing wrong information or false records. At the same time, although the investigating officer is bound by several conditions and restriction prescribed under the Companies Act; but at the same time, he has also been conferred the power to record the statement on oath and certain powers of Civil Court for enforcing attendance and seeking documents etc. So whatever coercion is inbuilt in this procedure; is the coercion of law and not of the individual investigating officer. Legal coercion to speak the truth; accompanied by the legal protection against unjust harassment; cannot be branded as unfair process. If at all the individual investigating officers is alleged to have exercised actual coercion; as of fact or the pressure; in some case, the accused would be at liberty to expose such aspect by getting an opportunity to cross-examine such an investigating officer and by leading other evidence to this effect. Hence this court finds no ground to discard the statement of the petitioner and his co-accused; even for the purpose of

Lastly, this court also does not find any substance in the argument of the counsel for the petitioner that since the petitioner had joined investigation and he was also granted default bail but he has never made any effort to run away from the process of the law, therefore there is no material with the prosecution that either the petitioner would influence the witnesses or he shall flee from country if he is released on bail. Although the learned Counsel has heavily relied upon the judgment of Supreme Court in case of **P. Chidambaram V/s CBI, 2019 SCC Online SC 1380** to argue that unless there is independent material to show the effort of the accused to flee from country or to influence the witnesses, he should not be denied bail, however, this court finds that even in that case the Hon'ble Supreme Court has observed that no straight-jacket formula can be devised in this regard. Otherwise also, no such universal rule is possible or even desirable. Insisting upon independent material from the investigating officer; to show that the accused is likely to flee from country or to influence the witnesses or to destroy the evidence, is again, asking impossible from him, besides extending a dangerous inbuilt suggestion to him that he should always go beyond his brief of investigation and should try to find out or even to create some evidence or material to ensure that the accused could be denied bail. Unfortunately, if he succeeds in bringing some such material before the court and the court believes the same for denying bail to the accused, would not the same create a totally uncalled for bias against the accused during the trial. Only a mind which thinks of human thought process to be a compartmentalized aspect and in distinct water-tight segments, instead of being a rational and interdependent continual process, can deny this logical conclusion. Conspiracies and the designed intentions; being those aspects of human psychology which are

concealed deep within the grey matter; normally do not have easy external direct material to manifest. Even the Social or the political status of a person; or his economic clout; are no more easy indicators of moral moorings of a person; when it comes to crime, particularly the economic crime. After all, no investigating officer could have any material or anticipation that a Member of Parliament would flee from the country after committing alleged huge economic crime and the country would be forced to contest his extradition proceeding in a foreign land for years together; just to bring him to the justice, or that the business tycoons owning hundreds of companies and business of hundreds of billions of rupees would flee from the country after committing the alleged crime and would even start denying their Indian Citizenship. Although one can say that a few individuals cannot be made example to deny bail in deserving cases, but then, there is no pressing necessity for the courts to create concepts which neither withstands test of logic nor are contemplated by the statutory law. Grant or not to grant bail is discretion of the court. This discretion is; better left to be guided by the material on record qua the crime and the attending possible conclusion which can be drawn therefrom; than to be pushed to frontiers uncharted for the investigating agency. Therefore in view of this court; the possibility of the petitioner influencing the witnesses, fleeing from the process of the law or destroying the evidence, if at all required to be considered at this stage, has to be seen with reference to the material forming part of charge-sheet against him.

In view of the above, this court finds substance in the argument of the learned Counsel for the SFIO that since, as per the charge-sheet the petitioner is given to manipulations, for earning money, therefore, it cannot

be denied that by nature, the petitioner could be manipulative. Hence, this court has no reason to believe that if the petitioner is released on bail, he is not likely to influence the witnesses of the case and also not likely to destroy the evidence against him. The past conduct of the petitioner has also not been exemplary. The argument of the learned Counsel for the petitioner that the petitioner had been joining the investigation and was released on bail as well; and that during that duration he had not made any attempt to influence the witnesses or to destroy the evidence also does not find favour with this court. Rather; this court finds force in the argument of the counsel for the SFIO that at that time the petitioner was not sure of him being made an accused in the case, and being made an accused of a serious offence on multiple counts. Therefore he might not have resorted to that exercise. But now, when the petitioner is fully aware that his alleged crime on multiple counts has been detected, it may not be in the fitness of the things to expect the same straightforward conduct from the petitioner, who is alleged to be manipulative by disposition. Also the argument of the counsel for the SFIO that since the vocation of the petitioner and his Companies is only to commit crimes to earn money, therefore, by any means, it cannot be said that if the petitioner is released on bail, he would not commit any offence again, also finds favor with this court.

In view of the above, this Court does not find any merit in these petitions and the same are dismissed.

(RAJBIR SEHRAWAT)
JUDGE

13.11.2019

SV/Ashwani