

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO.158 OF 2021

The Union of India,
Through,
Directorate of Enforcement,
4th Floor, Kaiser-I-Hind,
Currimbhoy Road, Ballard Estate,
Mumbai-400 001.
(Mr. Niraj Kumar, the Asst. Director, ED ... Applicants

Vs

1 Shri Yogesh Narayanrao Deshmukh
Age 43 years,
Virajmaan Villa, Opp: Rosalie Complex,
Behind D Mart, Godrej Hill Road,
Barave, Kalyan (West) 421 301 .. Respondent/Accd.

2 The State of Maharashtra

...

Mr. Anil Singh, Additional Solicitor General a/w Mr. Aditya Thakkar with Mr. Shreeram Shirsat a/w Ms. Smita Thakur a/w Mr. Pranav Thakur a/w Mr. Amardeep Singh Sra, for the Applicants.

Mr. Rajiv Chavan, Senior Counsel, a/w Mr. Aniket Nikam a/w. Mr. Mayank Tripathi with Ms. Priyanka Dubey a/w Ms. Aamrin Malik i/by Hedgehog & Fox LLP for the Respondent No.1.

Ms. P.P.Shinde, APP for the Respondent-State.

CORAM : SANDEEP K. SHINDE J.
RESERVED ON: 25TH AUGUST, 2021.
PRONOUNCED ON: 8TH SEPTEMBER, 2021

JUDGMENT :

This application under Section 439(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C' for short) challenges the order dated 11th August, 2021 passed by the learned Special Judge designated under the PMLA Act at Greater Bombay for Bombay, granting bail in PMLA Case, ECIR 14/MZO/2013 to the respondent.

2 Applicant Directorate of Enforcement Department of Revenue, Ministry of Finance, Government of India is, the statutory Investigating Agency established in India, and entrusted with the task and authority to implement and enforce the provisions of the Prevention of Money Laundering Act, 2002 (Hereinafter referred to as "PMLA Act").

3 Heard Mr. Anil Singh, the learned Additional Solicitor General and Mr. Rajiv Chavan, the learned Senior Counsel for the respondent no.1.

4 Mr. Chavan the learned Senior Counsel for the respondent no.1 has raised preliminary issue as to the maintainability of the application filed under Section 439(2) of the Code of Criminal Procedure, 1973 ('Cr.P.C.' for short) and would contend that provisions of Section 439(2) of the Cr.P.C. cannot apply in a case where an order for release of bail has not been availed of.

5 Mr. Anil Singh, the learned Additional Solicitor General for applicants contended that;

- (i) The Trial Court while granting bail relied on the irrelevant material although prima-facie, case of money laundering has been made out against the respondent no.1;
- (ii) The learned Court has not recorded, what were the

fresh grounds which persuade it to take a view different from one taken in the earlier application;

(iii) after rejecting first bail application on 18th June, 2021, there was no change in circumstance to review its first order

(iv) that twin conditions of Section 45(1) of the PMLA Act were not adhered to by the learned Judge while granting bail to the respondent no.1.

6 Two points of law of some consequences have fallen for decision in this application;

(i) Whether Section 439(2) of the Cr.P.C. can have no application unless accused is released from the 'custody' ?

(ii) Whether decision in **Nikesh Tarachand Shah 2016(11) SCC 1** has lost its significance because of amendment in Section 45(1) of the PMLA Act

AND

(iii) Whether Trial Court while granting bail, acted upon the irrelevant material and ignored the relevant material ?

FACTUAL MATRIX-PROSECUTION CASE :

7 Briefly stating, case of the prosecution is that the MRA Marg Police Station registered First Information Report No.216 of 2013 dated 30th September, 2013 under Sections 120B, 467 and 471 of the Indian Penal Code, 1861 ('IPC' for short) against M/s. National Spot Exchange Limited (hereinafter referred to as 'NSEL'), its directors and key officials of NSEL, 25 defaulters of NSEL and others on a complaint filed by the Shri Pankaj Ramnaresh Saraf. He stated that he was to receive payments against trader's contracts offered by the NSEL for various commodities; that he was cheated by NSEL by creating false impression of being proper spot exchange with correct risk management systems in order to induce him to trade on the spot

exchange. He would allege that genuine investors were defrauded of their investments by way of serious misappropriations since NSEL allowed trading on the commodities of sellers without ensuring goods of appropriate quantity and quality stored in exchange controlled warehouses, which resulted in thousands of investors trading in “non-existent goods”. The accused persons hatched a criminal conspiracy to defraud the investors, induced them to trade on platform of spot NSEL, created forged documents like bogus warehouse receipts, falsified the accounts and thereby committed criminal breach of trust in respect of Rs.202 Lakhs of the complainant and Rs.5600 Crores of others approximately 13,000 investors.

8 Prosecution case is that, suspect persons have committed offence punishable under Section 120B, 467, 471 of the Indian Penal Code, 1860, which are Scheduled Offences under Paragraph 1 of Paragraph A of the Schedule

to Prevention of Money Laundering Act, 2002 (As Amended) ('PMLA Act' for short). On the basis of aforesaid information, PMLA Case vide ECIR 14/MZ0/2013, dated 14th October, 2013 was registered against NSEL, Directors, its key officials, 25 defaulters of NSEL and others for investigation under the provisions of the PMLA Act.

9 Investigation revealed that defaulters M/s. Astha Minmet India Private Limited and M/s. Juggernaut Projects Ltd. resorted to large-scale laundering of funds earned by indulging into the criminal activity of fictitious trading of commodities. Multiple transactions were used to bring such proceeds of crime into the banking channel and to layer and mask the criminal origin of funds so as to further layer and project the same as untainted and avoid detection. Investigation revealed that funds / movable / immovable properties totally valued at Rs.186.22 Crores were purchased by the said accused out of proceeds of crime. During the course of the investigation, bank accounts of

M/s. Vihang Aastha Housing Projects LLP was called and scrutinised. It was noticed, that M/s. Vihang Aastha Housing Projects LLP received Rs.21,74,000,00/- from M/s. Aastha Group of Companies, i.e., M/s. Aastha Minmet India Limited, Aastha Alloy Steel Limited during the September, 2012 to April, 2013.

10 Investigation disclosed, that earlier M/s. Vihang Housing LLP was formed on 21st May, 2012 with the partners; Vihang Pratap Sarnaik; Purvesh Pratap Sarnaik; Yogesh Kishor Chandigala; Vihang Infrastructure Pvt. Ltd.; Vihang Constructions & Hospitality LLP. On 8th November, 2012, a retiring agreement was executed and partners of M/s. Vihang Infrastructure Pvt. Ltd. and Vihang Constructions & Hospitality LLP exited from the Vihang Housing LLP. On the same day of retiring the old partners, a LLP agreement was executed vide which new partners, Mr. Pratap Sarnaik, Mr. Mohit Aggarwal, Mrs. Shilpa Aggarwal and M/s. Aastha Alloy Steel Pvt. Ltd. were inducted and name of M/s. Vihang

Housing LLP was changed to M/s. Vihang Aastha Housing Projects LLP.

11 It is the prosecution's case that the respondent no.1 received Rs. 10.50 Crores from M/s. Vihang Aastha Housing Projects LLP during December, 2012 to September, 2013.

12 Investigation revealed that the respondent no.1 was a land aggregator based in Titwala. He had purchased lands from various farmers and consolidated the same into three parcels; That vide agreements dated 11th February, 2013, 5th March, 2013 and 17th September, 2013, he handed over possession of the land under the said three agreements to the Vihang Group; that the land was measuring approximately 78 acres and total consideration for the said land was Rs.20,85,94,000/-; that however, vide the three agreements an amount of Rs.8.50 Crores was shown as paid to him and the balance amount was to be

paid after effecting all the clearances pertaining to the said land. It is further the case that in actual, the respondent no.1 only utilized Rs.1.34 Crores for land acquisition and rest of funds were further diverted by him to acquire various properties in his name and in the name of his wife.

13 Thus, it is the applicants' case that respondent no.1 has received, 'proceeds of the crime', to the tune of Rs.10.5 Crores siphoned off by Aastha Group from NSEL. The said proceeds of crime was received by the respondent no.1 through M/s. Vihang Aastha Housing Projects LLP in the name of acquisition of land parcels of 78 acres in Titwala. Although the respondent no.1 received total amount of Rs.10.5 Crores against the said land parcels, total acquisition value of the said land parcels was only Rs.1.70 Crores. Thus, alleged in actual, rest of the funds were further diverted by him to acquire various properties in his name and in the name of his wife. Investigation also revealed that the farmers/land owners whose lands,

respondent no.1, sold to M/s. Vihang Aastha Housing Project LLP, have not been sold to Respondent No.1 by these farmers and the said farmers are actual owners of the said land parcels. Respondent No.1 transferred these land parcels fraudulently to M/s. Vihang Aastha Housing Projects LLP and thus, also cheated the farmers. Therefore, it is the case of the applicant that, the respondent no.1 is in receipt of proceeds of crime to the tune of Rs.10.5 Crores within the purview of Section 2(1)(u) of the PMLA Act, which he layered and integrated in form of properties in the name of himself and his wife.

14 The respondent no.1 was arrested on 6th April, 2021. On 21st May, 2021, respondent no.1 filed an application for bail before the Special Judge. It was rejected vide order dated 18th June, 2021 ('First Order' for short).

15 Applicant filed complaint/charge-sheet on 4th June, 2021. Cognizance of the same was taken on 16th June,

2021.

16 Copy of the charge-sheet of the complaint was received by the respondent no.1 on 18th June, 2021.

17 On 19th July, 2021, respondent no.1 filed another bail application before the Special PMLA Court.

18 The learned Special PMLA Court allowed the application and granted bail on the following grounds:

(I) Filing of complaint/charge-sheet constitutes change in circumstance. It indicates investigation was over.

(ii) That prosecution has not made any efforts to arrest partners/directors of Vihang Aastha Housing Projects LLP, from whom alleged 'Proceeds of Crime' were received by the, applicant-accused.

(iii) Since after rejection of the first bail

application, there was no progress in the investigation to justify further detention of the applicant.

(iv) Applicant-accused had withdrawn his objection to making the attachment of his properties absolute in proceedings MA 451 of 2016.

19 Before adverting to the contentions of the applicants, let me deal with, preliminary objection, raised by Mr. Chavan, the learned Senior Counsel for the respondent, as to maintainability of the application filed under Section 439(2) of the Cr.P.C.; Section 439(2) reads as under:

“439. Special powers of High Court or Court of Session regarding bail-

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

. Mr. Chavan, contended that plain reading of Section 439(2) of the Cr.P.C. implies that unless accused is actually released on bail, the prosecution could not have applied for

cancellation of bail. In support of this submission, Mr. Chavan relied upon the judgment of this Court in the case of **B.S.Rawat, Assistant Collector of Customs v. Leidomanm Heinrich, 1990 SCC Online Bombay 629**, wherein it is held, that until accused is actually released on bail, there is no right in the respondent/prosecution to apply for his arrest or committal to custody, i.e. cancellation of his bail. Mr. Chavan, would contend that, in view of the clear and explicit language of Section 439(2) of the Cr.P.C., instant application for cancellation of bail filed by the department was premature, since accused was not released on bail.

20 Next authority relied on by Mr. Chavan is the judgment of this Court in the case of, **Mahendra Manilal Shah (2010) Cr.L.J. 4257**. In the said judgment, Justice Kathawala has held that the expression “any Person who has been released on bail used in Section 439(2)” would mean, that accused is not only granted bail but, has availed of the same and is released from jail custody and, therefore, it is only then, that the Court may direct person to be re-arrested and commit to the custody

as provided in Section 439(2) of the Cr.P.C. Thus, held that, no question of re-arrest or re-committal to the custody can arise unless the accused is 'actually released', on bail granted to him. Thus, **Mahendra Manilal (Supra)** followed the judgment in the case of **B.S.Rawat (Supra)**. Mr. Chavan the learned Senior Counsel further elaborated his arguments contending that, bail means release from the custody or prison and delivered into the hands of sureties, who undertake to produce the accused in the Court on appointed date. Mr. Chavan submitted that expression "Release on bail" means release of a person from legal custody. He contended that word "Bail" is used in our common law for freeing or setting at liberty of one arrested or imprisoned upon any action, either civil or criminal, on surety taken for his appearance on a day and place certain. It is submitted that bail means actual/physical release of a person from legal custody and not just order releasing on bail. In support of the submissions, he relied on the following authorities;

(1) **Amitchand and Raghunath v. Crown Indian Law Reports (East Punjab Series) Page 515;**

(2) State of MP v. Narayan Prasad Jaiswal (1963) 2 Criminal Law Journal 375;

(3) Managing Director Balasaheb V. Kaashinath Kamble (2009) 2 SCC 88.

21 Mr. Chavan the learned Senior Counsel further submitted in this case, since prosecution, itself sought stay to “Release” of the respondent from the custody, application was obviously premature and it is required to be rejected on this ground alone.

22 Mr. Singh the learned ASG controverted submissions of Mr. Chavan and would submit that scope of Section 439(2) and right of prosecution under Section 439(2) to challenge unsustainable and perverse order cannot be narrowed down or curtailed by subjecting it to condition of actual release of accused. Mr. Singh submitted, this interpretation would defeat the scope and object of Section 439(2). Mr. Singh further submitted that the words used in Subsection (2) of Section 439 have to be read not disjunctively. Mr. Singh submitted that this

Court in the case of **Assistant Collector of Customs v. Madam Ayabo** 1992 Criminal Law Journal 4239 has dealt with the identical issue, after referring to the judgment of Justice Dhabe, in the case of **B.S.Rawat (Supra)**. Mr. Singh, the learned ASG has taken me through the said judgment. In the said case, accused was a Nigerian lady to whom the bail was granted by the Additional Sessions Judge. The bail order was challenged before this Court on the ground that if the accused is released from the custody being Nigerian National, it may be difficult for the Customs Department to trace the accused. It was submitted on behalf of the Customs Department, that regardless of whatever conditions which the Court may impose, experience shows that the department was not able to trace foreigners, who were released on bail because they themselves scare by going to different parts of the country itself or by leaving the country. Opposing the application on behalf of the accused, it was submitted that provisions of Section 439(2) cannot apply in any case, where order of release of bail has

not been availed of. Justice M.F. Saldanha, who delivered the said judgment has held and concluded that;

(a) This is a Section that takes into account circumstances under which a superior Court may interfere with a bail order that has been passed by a subordinate Court or wherein a Court may review an earlier bail order passed by a Court of parallel jurisdiction.

(b) An order directing the release of an accused on bail is an order that becomes effective forthwith unless the Court specifies that it will take effect after a certain amount of time has elapsed.

(c) An order for release of an accused on bail, therefore, is permissible of reconsideration, under Section 439(2) of the Code of Criminal Procedure, at any point of time after the order is passed.

(d) The law does not take into account formalities relating to the release of the accused, such as approval of surety nor does the law take into account a situation whereby for whatever reason the Accused person may not immediately avail of the bail order that is passed.

(e) that the clause "any person who has been released on bail under this Chapter" will have to be strictly construed as meaning any person who has been released on bail by a Court.

(f) The subsequent part of the Section entitles a Court to direct re-arrest and confinement to custody if the bail order has been availed of and in cases where the bail order has not been availed of, the subsequent part of the Section would be rendered redundant.

(g) The Section is required to be interpreted rationally and in keeping with the purpose for which it was put on the statute book.

23 The next authority, relied on by Mr. Singh is the order passed in the case of, **State of Maharashtra v. Santosh Hiranman Purankar (2005) SCC On-line Bombay 246**. In this case the State sought cancellation of anticipatory bail granted in the offence punishable under Section 306 of the IPC. Besides, merit challenge was also founded on the ground that accused/respondent have violated conditions on which anticipatory bail was granted in their favour. In the sense neither

they reported to the police station at any point of time after the order was passed, though that was one of the conditions. Respondent/accused in the said case relied on the judgment of this Court in the case of **B.S.Rawat (Supra)** to contend that application was premature unless order to arrest or re-arrest is passed. Meeting with this contention, the learned Judge of this Court has held that:

“9.....The exposition in the case of B.S.Rawat (Supra), which is pressed into service, in my opinion, are of no avail to the Respondents. The observations in the said decision are misread by the Counsel for the Respondents. On the other hand, the learned A.P.P. has rightly pressed into service decision of our High Court reported in 1992 Cri.L.J.2349 in the case of Assistant Collector of Customs (P), Bombay v. Madam Ayabo Atenda Ciadipo Orisan which had occasion to consider the reported decision in the case of B.S.Rawat (Supra) relied upon by the Respondents. In paras 8 and 9 of the said decision, the Court has considered the purport of section 439(2) of the Cr.P.C. Similar argument was canvassed in that case which, however, has been rejected. The Court has observed that if such argument was to be accepted, it would amount to grafting on a clause to the Section which does not exist in it and it would amount to narrowing down the scope of that section which is something that is impermissible having regard to the principles of law that govern the interpretation of statutes.”

24 Mr. Singh the learned ASG submitted that the judgment of this Court in the case of **Mahendra M. Shah**

(Supra) is per-incuriam. Submission is, although in **Mahendra M. Shah**, judgment in **B.S.Rawat (Supra)** has been followed, but judgment in the case of **Madam Ayabo (Supra)** delivered in October, 1990 was not brought to the notice of the Court. Mr. Singh submitted, Justice M.F.Saldanha, who had delivered the judgment in **Madam Ayabo (Supra)** has distinguished the judgment in **B.S.Rawat (Supra)** and concluded that application under Section 439(2) of Cr.P.C. was maintainable, against the unsustainable bail order irrespective of fact, whether accused is actually released on bail. Mr. Singh vehemently submitted that the two learned Judges of this Court in the case of **Madam Ayabo** (Justice M.F.Saldanha) and in the case of **State of Maharashtra v. Santosh Hiranman Purankar** (Justice A.M.Khanwilkar) have taken consistent view that if bail order itself is manifestly wrong, section 439(2) would not provide any bar to the prosecution from asking for review of that order and question as to where accused is physically released or not is quite irrelevant. Mr. Singh, therefore, submitted that the ratio laid down in the case of **B.S.Rawat (Supra)** would not deter this Court from entertaining the application and, therefore,

preliminary objection raised by respondent/accused be overruled and application be decided on merits.

25 I have perused the judgments cited by the learned counsel in support of their respective contentions. In my view, Mr. Singh the learned ASG has rightly pointed out that judgment in the case of **Mahendra M. Shah (Supra)** is per incuriam since the view taken in of **Madam Ayabo (Supra)** and the order in the case of **Santosh H. Purankar (Supra)** as to the scope and interpretation of Section 439(2) of the Cr.P.C. was not brought to the notice of Justice Kathawala. The Hon'ble Apex Court of **Sandip Bafna 2014(16) SCC 623**, has held; "that a decision or judgment can be per-incuriam, any provision in statute, rule or regulation, which was not brought to the notice of the Court. A decision or judgment can also be per-incuriam, if it is not possible to re-concile its ratio with that of previously pronounced judgment of co-equal or larger bench; or if the decision of the High Court is not in consonance with the views of this Court." The Apex Court has further clarified that per-incuriam rule is strictly and correctly applicable to the ratio

decidendi and not to obiter dicta. Herein consistent view of the two learned Judges in two cases was not brought to the notice of Justice Kathawala in Mahendra M. Shah and, therefore, the judgment in **Mahendra M. Shah (Supra)** was per incuriam and, therefore, it is to be kept out of consideration.

26 Thus interpretation suggested by Mr. Chavan, if accepted, would render the provisions of Section 439(2) redundant and uncertain. To give common instance; say in a case, even after passing the order to release on bail, accused does not avail the bail, by taking steps, then in that case prosecution or person aggrieved by the order granting bail, may have to hold back the challenge till accused is actually released on bail. It would render the challenge “conditional”. This interpretation would not only make the operation of Section 439(2) conditional but would also suspend right of aggrieved person to challenge the order until the accused is actually released from the custody. May be in a case, say even after granting bail, accused could not avail the bail for want of surety or for such other reasons, then in that case, such order although

was perverse would form part of the record, and may have its own consequences. Obviously, this would, defeat not only object of Section 439(2) but also defeat, statutory right of aggrieved person to challenge the said order. Thus, interpretation suggested by Mr. Chavan, would amount to grafting on a clause of Section 439(2), which does not exist in it and would amount to narrowing down the scope of Section 439(2) of the Cr.P.C. which something is impermissible having regard to the principles of law that govern the interpretation of statutes.

27 For the reasons aforesaid, in my view, instant application filed by the prosecution under Section 439(2) is maintainable, although the accused actually has not been released. Primary objection as to the maintainability is overruled.

28 Next, Question is whether decision in **Nikesh Tarachan Shah (Supra)** has lost its' significance because of amendment in Section 45 of the PMLA Act. Mr. Singh, learned ASG vehemently submitted that, twin conditions set out in

Section 45 of the PMLA are valid and would be applicable in the instant case. This submission is made on following two grounds, viz.

- (i) binding precedent of the Hon'ble Apex Court holding that twin conditions apply; Reliance is placed on the judgment of the Apex Court in **P.Chidambaram (2018) 10 SCC 753**
- (ii) defect found by the Hon'ble Apex Court in **Nikesh T. Shah (Supra)** has been rectified by the legislative amendment.

29 Mr. Singh submitted that reading of **Nikesh T. Shah** would show that, only two conditions were struck down and not Section 45 in its entirety. It is submitted, that the unamended Section 45 was read down by the Hon'ble Apex Court, as applying to scheduled offences only, which excludes, the 'offence of money laundering'. Submission, is that after the judgment of the Apex Court in the case of **Nikesh T. Shah (Supra)**, provisions of Section 45(1) have been amended and amended provisions are applicable to the, 'offence of money laundering' , alone and nothing else. Mr. Singh submitted that twin conditions were not found per-se arbitrary or unreasonable

but its application to the offences in Schedule A were found to be arbitrary and, therefore, the legislature has amended the said section and cured the defect, which led to validation of the two conditions of Section 45(1) of the PMLA Act. Mr. Singh in support of this submission, to the great extent, relied on the judgment of the Apex Court in the case of **P. Chidambaram (Supra)** and in particular paragraphs thirty-six and thirty-seven thereof. Mr. Singh submitted that the observation in those paragraphs is, binding dictum, and would apply by its own force and this would have to be considered whilst determining, whether bail is valid or not. In other words, it is submitted that amendment of 2018 to the PMLA Act has revived twin conditions and, therefore, non-compliance of twin conditions set out in Section 45 of the PMLA Act would vitiate the order passed by the learned Special Court, which is impugned herein. Mr. Singh would also rely on the judgment of the Patna High Court in the case of **Moti Lal @ Moti Lal Patwa v. Union of India** in **Criminal Miscellaneous Application No.73052 of 2019** and judgment of Orissa High Court in the case of **Mohammad Arif in Bail Application No.2607 of 2020.**

30 In so far as the case of Mohammad Arif is concerned, the Patna High Court, has held that in view of the amendment to Section 45 by Amendment Act of 13 of 2018, the original expression “Imprisonment for a term for more than three years under Part A of the Schedule” stands substituted by the expression “No person accused of an offence under this Act shall be released on bail or on his own bond”. Thus, held, twin conditions of Section 45 would revive and apply to the offence of, money laundering. In so far as the judgment in the case of **Moti Lal** is concerned, the said judgment neither makes any reference to the judgment in **P.Chidambaram (Supra)** or deal with the effect of amendment to Section 45 of the PMLA Act. In the said case, bail was sought on a parity. Thus, the judgment of the Patna High Court in the case of **Moti Lal** does not further the case of the applicants.

31 Mr. Singh has also invited my attention to the judgments of this Court in **Samir Bhujbal v. Directorate of Enforcement (Bail Application No.286 of 2018)** and **Deepak Kochhar (Bail Application No.1322 of 2020)**. In

these judgments, this Court has held that, “amended Section 45, would not revive twin conditions as imposed in Section 45(1) of the PMLA Act and would not have application, while granting bail to the accused of an offence under the PMLA Act.” Mr. Singh submitted that the judgment in the case of **Samir Bhujbal** was delivered, before the judgment in the case of **P. Chidambaram** and, therefore, this judgment is to be kept out of consideration, while deciding the issue, as to the application of twin conditions to the offence of ‘money laundering’. In so far as the judgment in the case of, **Dipak Kochhar**, is concerned, Mr. Singh submitted, the learned Judge of this Court has not considered the, binding precedent, of the Apex Court in the case of **P.Chidambaram (Supra)**. Thus, Mr. Singh, learned ASG submitted that judgments in the case of Samir Bhujbal and Dipak Kochhar were of no assistance to the respondent-accused. Mr. Singh, the learned ASG would submit, although the Delhi High Court in the case of **Upendra Rai 2009 SCC Online 9086** has followed the **Sameer Bhujbal (Supra)** and taken a view that twin conditions do not revive, yet, the Hon’ble Apex Court in the SLP Diary No.5150 of 2020 has stayed the operation of

the impugned order passed in case of Upendra Rai. Therefore, it is argued that the respondents can not place reliance on the judgments in the case of **Samir Bhujbal (Supra)**, **Deepak Kochhar (Supra)** and **Upendra Rai (Supra)**.

32 Mr. Singh, the learned ASG's whole endeavour is that the challenge in **Nikesh T. Shah (Supra)**, was limited to the twin conditions, as applying to Schedule Offences and the Hon'ble Supreme Court struck down the conditions in their application to Schedule Offences and not offence of 'money laundering'. That being so, the Apex Court has not struck down the entire Section 45, but its applicability to 'schedule offences'. These arguments are in conflict with the observation made in paragraph twenty-seven of **Nikesh T. Shah (Supra)**; wherein Hon'ble Apex Court has held that, *"Section 45 would have to be struck down as been manifestly arbitrary and providing the procedure, which is not fair or just and would thus, violated both Articles 14 and 21 of the Constitution of India"* and further held thus, *"Be that as it may, we are of the opinion that even though the Punjab High Court judgment appears to be correct, it is*

unnecessary for us to go into this aspect any further in view of the fact that we have struck down Section 45 of the 2002 Act as a whole.”(emphasis supplied)

. Thus, in **Nikesh T. Shah (Supra)**, the Hon’ble Apex Court has struck down Section 45 of the PMLA Act, as a whole having found it arbitrary and violative of Article 14 & 21 of the Constitution of India and not just applicability of twin conditions to scheduled offences and, therefore, I agree with a view taken by this Court in the case of Samir Bhujbal, Dipak Kochhar and in the case of Upendra Rai by the Delhi High Court, that Amendment of 2018, would not revive twin conditions and would have no application while granting bail to accused of an offence of ‘money laundering’.

33 Although the learned ASG strenuously argued that the judgment in the case of **P. Chidambaram (Supra)** is binding a precedent, as to application of twin conditions, to offence under the Act; however, issue as to the application of twin conditions to the offence of money laundering, after 2018 amendment, has not been deliberated upon either in

paragraphs 35 or 37 or in other part of the judgment. For these reasons, judgment in **P. Chidambaram**, would not advance applicants' case.

34 Once, it is held that twin conditions enumerated under Section 45 of the PMLA Act have no application while granting bail to accused of money laundering, it is to be ascertained, whether the trial Court granted bail on irrelevant considerations.

35 Mr. Singh, the learned Additional Solicitor General would contend that the Special Judge granted bail to the respondent no.1 by ignoring the "relevant material", indicating prima-facie, involvement of the respondent no.1; yet has taken into account "irrelevant material" which has no relevance to question of grant of bail to the respondent no.1. While arguing the scope of Section 439(2) of the Cr.P.C., Mr. Singh, submitted that when it appears to the superior Court that the Court granting bail acted on the irrelevant material and there is no application of mind or

where the Court does not take note of any statutory bar for grant of bail, order for cancellation of bail can be made.

36 Mr. Singh's main point of argument, is that the learned Judge, while rejecting the first bail application as well as subsequent bail application, found applicant's complicity in laundering of "proceeds of the crime" by acquiring the property out of the amount of Rs.10.50 Crores as untainted properties. Thus, submitted, once the Court was satisfied about of applicant's complicity in the activity of money laundering, applicant could not have been released on bail in view of the nature and gravity of offence committed by him. Mr. Singh vehemently submitted that the respondent-accused is, land aggregator and politically well connected. He has purchased the lands from farmers, who have been duped by him. He would rely on the statement of farmers and particularly of one, Rohit Deshmukh recorded on 8th April, 2021 under Section 50(2) and 50(3) of the Act. Mr. Singh submitted that the applicant

has fraudulently purchased the lands from poor farmers and transferred to M/s. Vihang Astha Housing Projects LLP, of which, director's are co-accused. Reliance has been placed on the statement of one Vikram Dalvi, who has been cheated by the respondent-accused from whom applicant has agreed to purchase the land. Submission is that the Special Court while granting the bail, ignored the statement of farmers and land owners, who have been duped by the respondent-accused. Next submission is, that offence of money laundering, "being economic offence", it constitutes a class apart and need to be visited with different approach in the matter of bail. It is submitted that investigation is still going on with regard to role of accomplice of the accused including the accused/respondent to derive the end use and to trace money trail. Mr. Singh submitted that the partners and directors of Astha Group since have been granted protection by the Hon'ble Supreme Court vide the order dated 30th June, 2021 and therefore have not been interrogated. Mr. Singh submitted that protection granted to

the co-accused was not on the merits but in view of the order dated 16th June, 2020 passed by the Hon'ble Apex Court in the Special Leave Petition instituted by **Paramvir Singh Saini v. Baljit Singh and Ors.** Mr. Singh further submitted, interim protection granted to co-accused, itself was not a ground to release the applicant on bail. He further submitted, on release of the applicant, there is every possibility of tampering the prosecution evidence since co-accused have also been granted protection from the arrest.

37 Mr. Singh, learned ASG, argued that although the material in the charge-sheet was not considered by the trial Court while deciding the first bail application, yet, filing of the charge-sheet would not constitute, 'change' in the circumstance. Submission is, even assuming that the trial Court had not referred to material in the charge-sheet while rejecting first bail application, yet filing of the charge-sheet, itself would not constitute a change in the circumstance.

According to Mr. Singh, it was irrelevant consideration. On the point of 'irrelevant considerations', Mr. Singh, relied on the following judgments:

(1) Kalyan Chandra Sarkar v. Rajesh Ranjan @ Pappu Yadav and Anr. (2004) 7 Supreme Court Cases 528;

(2) Nikhil Malik v. State of Himachal Pradesh 2019 SCC OnLine HP 1294;

(3) Virupakshappa Gouda and Anr. v. the State of Karnataka in Criminal Appeal No.601 of 2017 in Criminal Appeal No.601 of 2017

. In the case of **Kalyan Chandra (Supra)**, accused Pappu Yadav, was granted bail by the High Court in eighth, successive bail application. Earlier six applications were rejected and SLPs were dismissed. Fifth successive application was allowed; however, in appeal, the Hon'ble Apex Court cancelled the bail as no fresh grounds were

recorded by the Hon'ble Apex Court while granting bail. In my view, this authority does not assist the prosecution. In **Nikhil Malik (Supra)**, High Court of Andhra Pradesh declined, to release the applicant on the ground of gravity and seriousness of the crime; although testimonies of three prosecution witnesses were recorded. In the Case of **Virupakshappa (Supra)**, appellants' first bail application was rejected by the Sessions Court and the order was confirmed by the High Court. Thereafter second Bail Application was moved. One of the grounds was that investigation has been completed and there has been a change in the circumstance. And hence, applicants were entitled to bail. Application was rejected by the Sessions Court and the order was not interfered with, by the High Court. The SLP was also dismissed in November, 2015. Whereafter third application was moved before the Sessions Court. It was allowed. At the instance of the complainant, High Court set aside the order of the Sessions Court. Against which accused had preferred Criminal Appeal

No.601 of 2017, before the Supreme Court. In the back-drop of the aforesaid facts, the Hon'ble Apex Court has held thus;

13. On a perusal of the order passed by the learned trial Judge, we find that he has been swayed by the factum that when a charge-sheet is filed it amounts to change of circumstance. Needless to say, filing of the charge-sheet does not in any manner lessen the allegations made by the prosecution. On the contrary, filing of the charge-sheet establishes that after due investigation the investigating agency, having found materials, has placed the charge-sheet for trial of the accused persons.

38 In, **Kalyan Chandra (Supra)** and **Virupakshappa (Supra)**, although successive bail applications were rejected and orders were confirmed in Special Leave Petition, bail was granted without recording 'Fresh grounds'. Here, facts are different. The observations in paragraph 13 in **Virupakshappa (Supra)** do not suggest that filing, of the charge-sheet/complaint, is not change in the circumstance. What has been observed is that filing of the "Charge-sheet" does not in any manner

lessen the allegations made by the prosecution. Therefore, in my considered view, the judgments in aforesaid three cases were of no assistance to the prosecution. Be that as it may, herein, the applicant was arrested on 6th April, 2021 for the offence punishable under Sections 3 and 4 of the PMLA Act. His first bail application was rejected on 18th June, 2021. Complaint/charge-sheet was filed on 4th June, 2021. Cognizance of the same was taken on 16th June, 2021.

39 The learned Special Court declined the bail (First Bail) to the respondent no.1 on the following grounds:

- (I) There was prima-facie material showing complicity of the applicant in the activity of laundering proceeds of the crime;
- (ii) Investigation was in progress;
- (iii) Partners/Directors of Vihang Aastha Housing Projects LLP were remained to be arrested;
- (iv) Release of the applicant would adversely

hamper the investigation as to the crime proceeds.

. However, while granting bail in subsequent application, the trial Court found, after rejecting the first application, there was no progress in the investigation at all, in-as-much as observations in paragraph no.9 of the order would show that no efforts were made by the prosecution to question co-accused at all. Although, it is submitted that the co-accused were granted protection by the Apex Court on 30th June, 2021, however, the order has not precluded the prosecution from questioning the co-accused, who were the partners/directors of the Vihang Aastha Housing Projects LLP. Nevertheless even before me, applicants have not placed any material suggesting progress in the investigation as against the respondent-accused. This being the position, it may be stated that prosecution, does not intend to proceed with the investigation against the accused; yet at the same time, would oppose bail plea of the accused on the ground that accused's release may adversely affect "meaningful"

investigation. I do not see substance in this approach of the prosecution. Even otherwise, prosecution case rests and founded on documentary evidence and, therefore, even if applicant is released on bail, chances of tampering the prosecution evidence are weak and faint. Apart from that, it is worthwhile recording here that NSEL Management, Persons, Defaulters of NSEL and persons associated with Aastha Group (Mohit Aggarwal and Sham Kejriwal) have been granted bail either by Special Court or by the High Court, having a greater role than the present applicant. Mr. Chavan, the learned Senior Counsel for the respondent, has placed for my perusal, orders granting bail to twenty co-accused, who may have similar or greater role than the present accused. Even otherwise offence under Sections 3 and 4 of the PMLA Act is offence punishable upto seven years.

40 In consideration of the facts of the case and for the reasons stated, in my view, the trial Court while granting bail to

respondent-accused has not acted upon the irrelevant material and ignored the relevant material.

41 Application is rejected.

(SANDEEP K. SHINDE, J.)

42 At this stage, the request of Mr. Anil Singh, the learned Additional Solicitor General, to continue interim order for a period of two weeks is declined.

(SANDEEP K. SHINDE, J.)