

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRM-M-9659-2021 (O&M)

Reserved on: 19.05.2021

Date of Decision: 02.06.2021

Jagdish Nangineni

....Petitioner

Versus

Directorate of Enforcement

...Respondent

CRM-M-16596-2021(O&M)

Jagdish Chandra Sharma

....Petitioner

Versus

Directorate of Enforcement

...Respondent

CORAM: Hon'ble Mr.Justice Deepak Sibal

Present: Mr.R.S.Rai, Senior Advocate with
Mr.Kapil Madan, Advocate,
Ms.Rubina Virmani, Advocate
Mr.Saurabh Gauba, Advocate and
Mr.Amandeep Singh, Advocate, for the petitioner
in CRM-M-9659-2021

Mr.Mukul Rohtagi, Senior Advocate with
Mr.Gyanendra Kumar, Advocate,
Ms.Shreya Som, Advocate,
Mr.Robin Grover, Advocate, and
Mr.Amandeep Singh, Advocate, for the petitioner
in CRM-M-16596-2021

Mr.S.V.Raju, Addl. Solicitor General of India with
Mr.Nitesh Rana, Advocate,
Mr.Zoheb Hossain, Advocate,
Mr.Shobit Phutela, Advocate,
Mr.Shaurya Rai, Advocate,
Mr.Guntur Pramod, Advocate,
Mr.Anshuman Singh, Advocate and
Mr.Agni Sen, Advocate, for the respondent

Deepak Sibal, J.

This order shall dispose of two petitions being CRM-M-9659

of 2021 – Jagadish Nangineni vs. Directorate of Enforcement and CRM-M-16596-2021 – Jagdish Chandra Sharma vs. Directorate of Enforcement both of which have been filed for the grant of anticipatory bail in case bearing No.ECIR/01/HIU/2019 dated 25.01.2019 registered under Sections 3 and 4 of the Prevention of Money Laundering Act, 2002 (for short – the PMLA), arising out of FIR No.291 dated 13.12.2018 registered under Section 10 of the Haryana Development and Regulation of Urban Area Act, 1975 (for short – the 1975 Act) and Section 420 IPC at Police Station Bajghera, District Gurugram.

Briefly stated, the case of the prosecution is that on 31.03.2007, Chintels India Limited (for short – Chintels), which owned 149.093 acres of land in Gurugram, applied to the Director, Town and Country Planning, Haryana (for short – DTCP) for the grant of a licence under the 1975 Act for developing a residential colony. Thereafter, on 28.03.2008, Chintels and QVC Realty Company Limited (for short – QVC), the assignors of the aforesaid land, entered into an agreement with Sobha Limited (for short – Sobha) for developing the aforesaid land on a salable area sharing basis and in support of the aforesaid application for the grant of licence, filed such agreement before the DTCP. On favourable consideration of the application, on 22.11.2008, Chintels and DTCP entered into an agreement on the basis of which a licence bearing No.190/2008 dated 24.11.2008 was issued in favour of Chintels. As per the relevant term of the agreement, on which the licence was based, Chintels was required to reserve 25% of the developed residential plots on a 'No Profit No Loss' (for short – NPNL) basis. It was further agreed between the parties that 75% of the NPNL plots would be allotted to registered applicants through a draw of

lots (if so required) and the remaining 25% would be allotted to Non Resident Indians against Foreign Exchange; land owners whose land had been purchased by Chintels for setting up the colony; plots falling in small pockets which subsequently are acquired by the colonizers as part of an area already developed as a colony by Chintels and to such persons whom Chintels may like at its discretion (provided that such allotment did not exceed 5% of the total number of NPNL plots).

Two other licences bearing Nos.58/2013 and 79/2014 for 3.947 acres and 13.375 acres respectively, which also contained similar terms with regard to reserving and allotting NPNL plots, were also obtained by Chintels.

On the strength of the licences obtained by Chintels and the collaboration/ development agreements between Chintels, Sobha and QVC, the land, which was covered under the licences and was situated in Sectors 106, 108 and 109, Gurugram, was started to be developed as a residential colony under the name of 'International City'.

On 10.12.2018 the DTCP wrote to the Station House Officer, Police Station village Bajghera, District Gurugram through which the police was informed that as per the agreement/ terms of the licence Chintels was required to reserve and allot 249 NPNL plots. However, it had been found that only 84 NPNL plots had been allotted and out of these 84 plots, 55 had been allotted by Sobha to Limited Liability Partnerships (for short – LLPs) created by Sobha itself. Thus, by allotting the NPNL plots to virtually itself, Sobha, Chintels and QVC had conspired to commit fraud as also had violated the terms of the licence/ agreement. Therefore, the police was requested to take penal action against Chintels, Sobha, QVC and the LLPs

under Section 10 of the 1975 Act.

On the basis of the above complaint FIR No.291 under Section 420 IPC and Section 10 of the 1975 Act was registered at Police Station Bajghera, District Gurugram and after going through the aforesaid FIR, since the Enforcement Directorate (for short – ED) believed that an offence for laundering of money had also been committed, on 25.01.2019, the ED lodged Enforcement Case Information Report No.ECIR/01/HIU/2019 (for short – ECIR) under Sections 3 and 4 of the PMLA and started its own investigations.

Investigations conducted by the Haryana Police in the FIR lodged by them revealed that the accused therein were guilty of breach of the terms of the agreement/ licence but had not committed any offence under Section 420 IPC. Accordingly, the Haryana Police filed a report under Section 173 Cr.P.C. seeking therein to prosecute the accused only under Section 10 of the 1975 Act.

Since the accused in the FIR lodged by the Haryana police were no longer being prosecuted under Section 420 IPC, which was the only scheduled offence under the PMLA of which the petitioners were accused of, Chintels knocked the doors of the Delhi High Court through WP (CRL) 979-2020 - M/s Chintels India Limited vs. Union of India seeking therein quashing of the ECIR. Such petition was disposed of on 07.08.2020 with a direction that since at that stage the impugned ECIR was sans any scheduled offence under the PMLA the same be treated as closed. However, liberty was granted to the ED to revive the ECIR in case on the filing of a supplementary charge sheet and/ or framing of a charge against the accused they are sought to be prosecuted for any scheduled offence(s) under the

PMLA.

On 20.08.2020 the Haryana Police filed a supplementary charge sheet under Section 173(8) Cr.P.C. through which it was inter-alia alleged that qua licences Nos. 58/2013 and 79/2014 Chintels had not obtained any permission from the DTCP for change in beneficiary interest/ joint development rights and since for seeking such permission a fee was required to be paid, which remained unpaid, financial loss had been caused to the government resulting in playing of fraud with the public as also the State of Haryana. Accordingly, in addition to Section 10 of the 1975 Act, the accused were also sought to be prosecuted under Section 420 IPC.

On the happening of such an event, in terms of the liberty granted by the Delhi High Court, the ED revived the ECIR and again commenced their investigation. Though the investigation qua the petitioners, who are the employee and Managing Director of Sobha, respectively, remain pending, the ED completed their investigation against Chintels, QVC and the Managing Directors of QVC and Chintels and filed a complaint before the Trial Court seeking therein their prosecution under Sections 3 and 4 of the PMLA. In the said complaint it was inter-alia alleged that under licence No.190/2008 212 NPNL plots had been sanctioned by the DTCP in the lay out plan but Sobha, Chintels and QVC allotted only 93 such plots and out of these 93 plots Sobha had allotted 59 of them to LLPs created by Sobha. The purpose of formation of LLPs by Sobha was to fraudulently retain ownership of the NPNL plots with itself with a further dishonest intention to show on paper that these plots had been allotted to different parties, as NPNL plots, at the rates determined by the DTCP. Sobha then constructed Villas on these 59 plots to sell them at rates

at par with Villas sold under the General Category. So far as Chintels and QVC were concerned, they were alleged to have got constructed Villas on 18 and 16 NPNL plots respectively through Sobha and then having sold these Villas at rates which were equal to or even higher than the rates of the Villas sold under the general category and in this manner they had generated over Rs.50 crores and Rs.60 crores respectively. When the purchaser of such Villas came to Chintels and QVC for documentation, such purchaser was first asked to sign a document which would show that at an earlier point of time he/ she had been allotted a NPNL plot at the rate determined by the DTCP and that thereafter he/ she had sought construction of a Villa thereupon through Sobha. After the purchaser had been made to sign such document(s) the petitioners then incorporated in the sale/ conveyance deed the price of the land at the rate so determined by the DTCP and correspondingly inflated the cost of the construction to reach at the final sale price which was equivalent to or even higher than the price of Villas sold under the general category.

It is further the case of the prosecution that on 25.05.2012, Sobha and Chintels entered into 59 agreements to sell through which they agreed to sell 59 NPNL plots to LLPs created by Sobha at the price determined by the DTCP for sale of NPNL plots. On these agreements petitioner - Jagadish Nangineni appended his signatures on behalf of Chintels and Sobha. The sale consideration of Rs.48 lakhs for each of the plots was agreed to be paid within 24 months from the date of execution of the agreement. Within three weeks from the date of the aforesaid agreement, the LLPs created by Sobha, through 59 agreements to sell, all dated 15.06.2012, further agreed to sell the NPNL plots to Eunomia

Developers (for short – Eunomia), which was another LLP created by Sobha. This time the agreed sale consideration for each plot was a little less than Rs.50 lakhs and the payment was to be made on or before 24 months from the date of execution of the agreement. Thereafter, through separate agreements dated 22.7.2012, 30.04.2012 and 17.03.2012 Eunomia and Sobha entered into a joint development agreement to develop the 59 NPPL plots. Through such agreement they agreed to the revenue sharing ratio between Eunomia and Sobha to be 17:83. To the joint development agreement also, on behalf of Sobha it was the petitioner - Jagadish Nangineni who appended his signatures. After construction of the Villas on all the 59 NPPL plots they were put to sale for a price which was equivalent to or higher than the Villas sold under the general category and the conveyance deed with the purchaser of such villas was not between the land owner - Eunomia and the purchaser but between Sobha/ Chintels on one hand and the purchaser on the other. On the conveyance deed also petitioner - Jagadish Nangineni appended his signatures on behalf of Sobha and Chintels. The sale consideration for each of the Villas, as per the conveyance deed, was Rs.3.56 crores but the purchaser(s), on being questioned by the ED, stated that they had paid to Sobha/ Chintels an amount of Rs.4.25 crores for the entire property.

During the search operations conducted by the ED on the premises of Sobha, Chintels and QVC several incriminating documents have been found which include documents showing payment of over Rs.220 crores by Sobha to Chintels/ QVC including Rs.120 crores (approximately) as non-refundable deposit paid by Sobha to Chintels/ QVC much before the issuance of the licence.

It has been contended on behalf of the petitioners that they have been falsely implicated in this case; both of the petitioners have already been questioned by the ED on several occasions and during such questioning they have duly cooperated with the investigating agency; the entire case of the prosecution is based on documents which have already been seized in the course of several raids conducted by the ED on the premises of both the petitioners; the ECIR itself is illegal as the only scheduled offence under the PMLA on which the ECIR rests i.e. Section 420 IPC, is not made out because the allegations to attract applicability of Section 420 IPC are based on an alleged breach of the terms of the agreement/ licence between Chintels and the DTCP which breach is exclusively covered under Section 10 of the 1975 Act; even in the initial complaint filed by the DTCP, which became the basis for lodging of the FIR by the Haryana Police, the only allegation contained therein was that the accused had breached the terms of the agreement/ licence and therefore they be proceeded against under Section 10 of the 1975 Act; contravention of Section 10 of the 1975 Act is bailable as it entails a punishment for imprisonment which may extend to three years along with fine; in the supplementary charge sheet filed by the Haryana police the petitioners are sought to be prosecuted under Section 420 IPC only on the ground that qua licence Nos. 58/2013 and 79/2014 Chintels had not obtained prior permission from the DTCP for change in beneficiary interest/ joint development rights which had caused financial loss to the government which permission has since been taken; for the delay in taking such permission the applicable administrative charges, in terms of the order of the DTCP dated 01.04.2016, have already been deposited by Chintels and

thus there was no wrongful loss caused by the petitioners to any person/ authority; there is no complainant, including the DTCP, who/ which even alleges that the petitioners have played any fraud; the prayer made by the ED seeking police remand has been repeatedly rejected by the Trial Court; in any case violation of the terms of the agreement/ licence with regard to selling of NPNL plots at a rate higher than the rates so determined by the DTCP is compoundable under the order of the DTCP dated 01.04.2016 as also under Section 3(7) of the 1975 Act at the time of completion of the project which stage is yet to reach; petitioner - Jagdish Chandra Sharma is the Managing Director of Sobha which is a company of international repute having a net worth of over one billion dollars; the petitioners are not a flight risk; in all the alleged transactions between Sobha/ Chintels and the LLPs/ Eunomia/ purchasers payments have been made through bank transfers making them as transparent as they could be; the petitioners do not have any criminal antecedents; there is not even an allegation that the petitioners have indulged in tampering of evidence or threatened witness; this Court in Criminal Miscellaneous No.9209-2016 – Raman Puri and others vs. State of Haryana and others has held that for the offences under the 1975 Act, provisions of the IPC would not apply and that the petitioners are also willing to abide by any condition that this Court may impose including deposit of their Passports.

The petitioners further seek anticipatory bail in view of the emergent situation being faced in the country due to rising cases under the Covid-19 pandemic.

Learned Additional Solicitor General of India sought dismissal of the present petitions and submitted that since he was opposing the grant

of anticipatory bail to the petitioners, in terms of the twin conditions prescribed in Section 45 of the PMLA, this Court could grant anticipatory bail to the petitioners only after recording a satisfaction that there were reasonable grounds for believing that the petitioners were not guilty of the alleged offences and that while on bail they were not likely to commit any offence; though in Nikesh Tarachand Shah vs. Union of India and another (2018) 11 SCC 1 Section 45(1) of the PMLA, as it then stood, had been declared unconstitutional by the Supreme Court but the defect pointed out by the Supreme Court which formed the basis to declare Section 45(1) to be unconstitutional had since been cured by the Legislature through its Act No.13 of 2018 which came into force from 19.04.2018; as per Act No.13 of 2018 the offending expression “punishable for a term of an imprisonment of more than three years under Part A of the Schedule” has been substituted with “under this Act”; in view of the afore amendment the twin conditions prescribed under Section 45(1) of the PMLA stood revived; the amended Section 45(1) of the PMLA has not been challenged by the petitioners and therefore the petitioners as also this Court was bound by the aforesaid twin conditions prescribed therein; in terms of the law laid down by the Supreme Court in Nagaland Senior Government Employees Welfare Association and others vs. State of Nagaland and others, (2010) 7 SCC 643 a statute is deemed to be constitutionally valid till struck down by a competent Court; in Molar Mal (dead) through L.Rs. v. M/s. Kay Iron Works (Pvt.) Ltd., (2000) 4 SCC 285 the Supreme Court had held that where the constitutional validity of a provision was not under challenge such provision would bind the Court; in Ashutosh Gupta vs. State of Rajasthan (2002) 4 SCC 34 the Supreme Court has opined that where the challenge is made to a statutory

provision allegations in the petition should be specific, clear and unambiguous and that there is a presumption in favour of the constitutionality of an enactment with the burden upon the person who attacks the provision to show that the same is unconstitutional; the Delhi High Court in Upendra Rai vs. Enforcement Directorate (2019) SCC Online Delhi 9086 and Dr.Shivinder Mohan Singh vs. Directorate of Enforcement 2020 SCC Online Del 766 held that Act 13 of 2018 would not revive or resurrect the twin conditions for grant of bail contained in Section 45(1) of the PMLA and on challenge before the Supreme Court such orders passed by the Delhi High Court have been stayed; the observations of the Supreme Court in Nikesh Tarachand Shah's case (supra) that Section 45(1) of the PMLA would not apply to the grant of anticipatory bail were obiter as this was not the issue which the Supreme Court had been called upon to consider and decide; in any case the findings returned by the Supreme Court that Section 45(1) would not apply to anticipatory bails were per incuriam since Section 45(1) applied to bails which would also include anticipatory bails and in this regard he placed reliance on the law laid down by the Supreme Court in Dr.Shah Faesal and others vs. Union of India and another (2020) 4 SCC 1, Sh.Balchand Jain vs. State of Madhya Pradesh (1976) 4 SCC 572, Satpal Singh vs. State of Punjab (2018) 13 SCC 813 and Sushila Aggarwal and others vs. State (NCT of Delhi) and another (2020) 5 SCC 1.

Responding to the plea raised on behalf of the petitioners that Section 420 IPC was not attracted to the present case, the learned ASG contended that in the supplementary charge sheet filed by the State police the petitioners are sought to be prosecuted under Section 420 IPC; such

charge sheet has not been challenged by the petitioners; the plea that Section 420 IPC is not applicable to the facts of the petitioners' case is premature as investigation by the ED qua the petitioners is still going on; so far, the ED has found that on 25.05.2012 Sobha and Chintels entered into 59 agreements to sell through which they agreed to sell 59 NPNL plots to LLPs created by Sobha at the price determined by the DTCP for the sale of NPNL plots; on these agreements petitioner – Jagadish Nangineni has signed on behalf of Chintels and Sobha; the sale consideration, for each plot, under such agreement i.e. Rs.48 lakhs, was agreed to be paid within 24 months from the date of execution of the agreement; within three weeks from the date of the aforesaid agreement the LLPs created by Sobha, through 59 agreements to sell, all dated 15.06.2012, further agreed to sell the NPNL plots to Eunomia, which was another LLP created by Sobha; this time the agreed sale consideration for each plot was a little less than Rs.50 lakhs and the payment was to be made on or before 24 months from the date of execution of the agreement; thereafter, through separate agreements Eunomia and Sobha agreed to jointly develop 59 NPNL plots with a further agreement to share the revenue in the ratio 17:83; this agreement was also signed by the petitioner – Jagadish Nangineni on behalf of Sobha and Chintels; after construction of the Villas on all the NPNL plots they were put to sale for a price which was equivalent to or higher than the Villas sold under the general category and the conveyance deed with the purchaser of such Villas was not between Eunomia and the purchaser but between Sobha/ Chintels on one hand and the purchaser on the other; on the conveyance deed also the petitioner – Jagadish Nangineni appended his signatures on behalf of Sobha and Chintels; the sale consideration for each

of the Villas, as per the conveyance deed, was Rs.3.56 crores whereas the purchaser(s), on being questioned by the ED, stated that they have paid an amount of Rs.4.25 crores for the entire properties.

With regard to applicability of Section 420 IPC to the present proceedings the learned ASG relied on the following observations of the Supreme Court in Tulsi Ram etc. vs. State of Uttar Pradesh AIR 1963 SC 666:-

“17. But, in an offence under Section 420 IPC a pecuniary question necessarily arises. The first part of Section 464 IPC provides that a person is said to make a false document who dishonestly or fraudulently makes, signs etc., a document with a particular intention and covers cases both of acts which are dishonest and acts which are fraudulent. Where no pecuniary question arises the element of dishonesty need not be established and it would be sufficient to establish that the act was fraudulent and, therefore, it may be, as the learned judge has held, that where an act is fraudulent the intention to cause injury to the person defrauded must be established. But where the allegation is that a person has dishonestly induced another to part with property something different has to be considered and that is whether he has thereby caused a wrongful loss to the person who parted with property or has made a wrongful gain to himself. These are the two facets of the definition of dishonesty and it is enough to establish the existence of one of them. The law does not require that both should be established.”

Learned ASG further argued that custodial interrogation of the petitioners was inter-alia required to go into the veracity and import of the aforesaid agreements as also to decipher the money trail since the cumulative amount involved in each set of the aforesaid agreements to sell was over Rs.250 crores and the cumulative unaccounted difference between

the actual and recorded sale price of the 59 NPNL plots was Rs.40 crores (approximately). The ED further seeks to probe if other persons are involved in the crime of which the petitioners are accused of. Seeking the petitioners' custodial interrogation the learned ASG relied upon the law laid down by the Supreme Court in P. Chidambaram vs. Directorate of Enforcement (2019) 9 SCC 24.

The PMLA, as enacted by the Parliament in the year 2002, contained Section 45(1) which read as under:-

“Section 45. Offences to be cognizable and non- bailable.—

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), no person accused of an offence punishable for a term of imprisonment of more than three years under Part A of the Schedule shall be released on bail or on his own bond unless—

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

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail:

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

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

(i) the Director; or

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

The afore quoted provision imposed two conditions before bail

could be granted to a person accused of an offence punishable for a term of imprisonment for more than three years under Part A of the Schedule attached to the PMLA. These conditions were that before grant of bail the Public Prosecutor was required to be given an opportunity to oppose the plea for bail and that where the Public Prosecutor opposed such plea the Court could order release of the accused on bail only after recording a satisfaction that there were reasonable grounds for believing that the person to be released was not guilty of the offence he was accused of and that while on bail he was not likely to commit any offence.

The constitutional validity of the afore quoted provision imposing the twin conditions for grant of bail was questioned before the Supreme Court in Nikesh Tarachand Shah's case (supra) and the Supreme Court, after holding that the prescribed twin conditions for release on bail were violative of Articles 14 and 21 of the Constitution of India declared Section 45(1) of the PMLA to that extent to be unconstitutional. The operative part of judgment of the Supreme Court is as follows:-

“54. Regard being had to the above, we declare Section 45(1) of the Prevention of Money Laundering Act, 2002, insofar as it imposes two further conditions for release on bail, to be unconstitutional as it violates Articles 14 and 21 of the Constitution of India. All the matters before us in which bail has been denied, because of the presence of the twin conditions contained in Section 45, will now go back to the respective Courts which denied bail. All such orders are set aside, and the cases remanded to the respective Courts to be heard on merits, without application of the twin conditions contained in Section 45 of the 2002 Act. Considering that persons are languishing in jail and that personal liberty is involved, all these matters are to be taken up at the earliest by the respective Courts for fresh decision. The writ petitions and the appeals are disposed

of accordingly.”

By Act 13 of 2018 Section 45(1) of the PMLA was sought to be amended w.e.f. 19.04.2018. Through such amendment the words “punishable for a term of imprisonment of more than three years under Part A of the Schedule” as occurring in Section 45(1) before the judgment of the Supreme Court in Nikesh Tarachand Shah's case (supra) were substituted with the words “under this Act”. As per learned ASG, after such amendment, the defect on the basis of which the Supreme Court had declared Section 45(1) of the PMLA to be unconstitutional was cured and consequently the twin conditions prescribed in Section 45(1) stood revived.

The declaration by the Supreme Court in Nikesh Tarachand Shah's case (supra) would render the twin conditions prescribed in Section 45(1) of the PMLA for release of an accused on bail to be void in toto; such conditions have to be disregarded of any legal force from its inception; they cease to be law; the same are rendered inoperative and that they are to be regarded as if they had never been enacted. That being so, the twin conditions for grant of bail under Section 45(1) of the PMLA as are now sought to be pressed into service by the ED cannot be considered to have revived or resurrected only on the prospective substitution of the words “punishable for a term of imprisonment of more than three years under Part A of the Schedule” with the words “under this Act” especially without there being any amendment with regard to the twin conditions for grant of bail which had specifically been declared to be unconstitutional as also in the absence of any validating law in this regard with retrospective effect.

Through an order dated 06.06.2018 passed by the Bombay High Court in Bail Application No.286 of 2018 – Sameer M. Bhujbal vs.

Assistant Director Directorate of Enforcement and another, a similar objection raised on behalf of the ED was considered and repelled through the following observations:-

“9. It is to be noted here that, after effecting amendment to Section 45(1) of the PMLA Act the words “under this Act” are added to Sub Section(1) of Section 45 of the PMLA Act. However, the original Section 45(1)(ii) has not been revived or resurrected by the said Amending Act. The learned counsel appearing for the applicant and the learned Additional Solicitor General of India are not disputing about the said fact situation and in fact have conceded to the same. It is further to be noted here that, even Notification dated 29.3.2018 thereby amending Section 45(1) of the PMLA Act which came into effect from 19.4.2018, is silent about its retrospective applicability.

In view thereof, the contention advanced by the learned A.S.G. cannot be accepted. It is to be further noted here that, the original Sub-section 45(1)(ii) has therefore neither revived nor resurrected by the Amending Act and therefore, as of today there is no rigor of said two further conditions under original Section 45(1)(ii) of PMLA Act for releasing the accused on bail under the said Act.

10. In view of the above, when there is no bar of twin conditions contained in original Section 45(1)(ii) of the PMLA Act, the present application has to be considered and decided under Section 439 of the Code of Criminal Procedure with or without conditions.

Sameer M. Bhujbal's case (*supra*) was considered and followed by the Bombay High Court in its judgment dated 25.03.2020 rendered in Bail Application No.1322 of 2020 – Deepak Virendra Kochhar vs. Directorate of Enforcement and another. The relevant observations in this regard are as follows:-

38. *The question is the provision which was held constitutional by Apex Court in the case of Nikesh Shah (supra) stands revived in view of Amendment as stated above to Section 45 of the Act. This Court in the case of Sameer Bhujbal (supra) has turned down the submission of respondents therein that Government has brought an amendment to Finance Act, 2018 which has come into effect from 19.04.2018 to Section 45(1) of PMLA thereby inserting words "under this Act" in Section 45 (1) of the Act. In view of amendment, the original sub- Section (ii) of Section 45(1) which imposes the said twin conditions automatically stands revived and the said condition therefore remain on statute book. The original Section 45(1) (ii) has to be inferred and treated as it still exists on the statute book and holds the field even as of today for deciding application for bail by an accused under PMLA. It was further argued that by inserting words "under this Act", the Judgment delivered by Supreme Court in Nikesh Shah (supra) has become in effective. The Court held that the Apex Court in Nikesh Shah (supra) has declared Section 45(1) of PMLA in so far as it imposes two further conditions for release on bail to be unconstitutional as it violates Articles 14 and 21 of Constitution of India. After effecting amendment to Section 45 (1) of PMLA. The words "under this Act" are added to sub- Section (1) of Section 45 of PMLA. However, the original Section 45(1) (ii) has not been revived or resurrected by Amending Act. Even notification dated 29.03.2018 amending Section 45(1) of PMLA which came into effect from 19.04.2018 is silent about its retrospective applicability. Hence, contention of respondent cannot be accepted. The Original sub-Section 45 (1) (ii) has neither revived nor resurrected by amending Act and therefore there is no rigour of twin conditions. This decision is still in the field. Although it is contended that, the decision has been challenged before Apex Court, it has not been set aside nor there is stay on the decision."*

To the same effect are the following observations by the Delhi

High Court in Sai Chandrasekhar vs. Directorate of Enforcement 2021

SCC Online Delhi 1081:

“17. Twin conditions mentioned in Section 45 of the PML Act continue to be struck down as being unconstitutional in view of the judgment of the Apex Court in the case of Nimesh Tarachand Shah vs. Union of India (2018) 11 SCC 1. The amendment in Section 45 by the Finance Act 2018 is only with respect to substituting the term 'offence punishable for 3 years' with 'offence under this Act'. The said amendment does not revive the twin conditions already struck down by the aforesaid judgment.

18. Since the twin conditions for bail in section 45 of the PML Act have been struck down by the Hon'ble Supreme Court and the same are neither revived nor resurrected by the Amending Act therefore, as of today there is no rigor of said two conditions under original Section 45(l)(ii) of the PML Act for releasing the Petitioner on bail. The provisions of Section 439 of Cr.P.C and the conditions therein will only apply in the case of the Petitioner for grant of bail.”

This issue has also been dealt in a similar manner by the Madhya Pradesh High Court in *M.Cr.C. No.34201/2018 - Dr.Vinod Bhandari Vs. Assistant Director, Directorate of Enforcement*, decided on 29.08.2018 and the High Court of Patna in Criminal Miscellaneous No.41413 of 2019 – *Ahilya Devi vs. The State of Bihar and others*, decided on 28.05.2020.

In view of the above discussion as also the reasoning given in the afore referred judgments by different High Courts, operation of none of which has been stayed by the Supreme Court and with which this Court concurs, this Court has no hesitation to hold that as on date the twin conditions for grant of bail, as sought to be pressed by the learned ASG, are

liable to be ignored and that the present petitions are required to be considered under Section 438 Cr.P.C.

In the light of the above conclusion, this Court considers it unnecessary to delve into the issues raised by the learned ASG with regard to the observations of the Supreme Court in Nikesh Tarachand Shah's case (supra) that Section 45(1) of the PMLA would not apply to anticipatory bails being per incuriam.

Learned counsel appearing for the petitioners contended that Section 420 IPC was not attracted to the facts of the present case whereas the learned ASG argued otherwise. Lengthy and elaborate submissions of both the sides on this issue have been referred to in detail in the earlier part of this judgment.

In the supplementary charge sheet filed by the Haryana Police in FIR No.291 dated 13.12.2018 registered under Section 10 of the 1975 Act and Section 420 IPC at Police Station Bajghera, District Gurugram the petitioners are sought to be prosecuted both under Section 420 IPC as also under Section 10 of the 1975 Act. There is no challenge by the petitioners to the supplementary charge sheet filed by the Haryana Police. Further, investigation by the ED qua the petitioners is still pending and therefore, it is impossible to know, at this stage, as to what the investigations would finally reveal. In the absence of any challenge by the petitioners to the aforesaid supplementary charge sheet as also during the pendency of the investigation by the ED qua the petitioners, this Court is not inclined to hold a mini trial on this crucial aspect especially when such consideration and any finding thereupon may prejudice either party's right to a fair investigation/ trial.

In State vs. Anil Sharma (1997) 7 SCC 187 the Supreme Court while considering the issue with regard to grant of anticipatory bail observed as under:-

“6. We find force in the submission of the CBI that custodial interrogation is qualitatively more elicitation oriented than questioning a suspect who is well ensconced with a favorable order under Section 438 of the code. In a case like this effective interrogation of a suspected person is of tremendous advantage in disinterring many useful informations and also materials which would have been concealed. Success in such interrogation would elude if the suspected person knows that he is well protected and insulated by a pre-arrest bail during the time he is interrogated. Very often interrogation in such a condition would reduce to a mere ritual. The argument that the custodial interrogation is fraught with the danger of the person being subjected to third degree methods need not be countenanced, for, such an argument can be advanced by all accused in all criminal cases. The court has to presume that responsible Police Officers would conduct themselves in responsible manner and that those entrusted with the task of disinterring offences would not conduct themselves as offenders.”

Recently in P. Chidambaram's case (supra) the Supreme Court considered the issue with regard to grant of anticipatory bail in the case of an economic offence like the present case and the relevant observations by the Supreme Court in this regard are as follows:-

“78. Power under Section 438 Cr.P.C. being an extraordinary remedy, has to be exercised sparingly; more so, in cases of economic offences. Economic offences stand as a different class as they affect the economic fabric of the society. In Directorate of Enforcement v. Ashok Kumar Jain, it was held

that in economic offences, the accused is not entitled to anticipatory bail.....

83. Grant of anticipatory bail at the stage of investigation may frustrate the investigating agency in interrogating the accused and in collecting the useful information and also the materials which might have been concealed. Success in such interrogation would elude if the accused knows that he is protected by the order of the court. Grant of anticipatory bail, particularly in economic offences would definitely hamper the effective investigation. Having regard to the materials said to have been collected by the respondent-Enforcement Directorate and considering the stage of the investigation, we are of the view that it is not a fit case to grant anticipatory bail.

84. In a case of money-laundering where it involves many stages of “placement”, “layering i.e. funds moved to other institutions to conceal origin” and “interrogation i.e. funds used to acquire various assets”, it requires systematic and analysed investigation which would be of great advantage. As held in Anil Sharma, success in such interrogation would elude if the accused knows that he is protected by a pre-arrest bail order. Section 438 Cr.P.C. is to be invoked only in exceptional cases where the case alleged is frivolous or groundless..... ”

In the afore quoted judgments the Supreme Court acknowledges that through custodial interrogation the investigating agency can garner more information from an accused when compared to

questioning the same accused who has been granted the protection of anticipatory bail and that in matters pertaining to economic offences the Court should exercise caution in the grant of anticipatory bail especially at the stage of investigation.

Petitioner – Jagdish Chandra Sharma is the Managing Director of Sobha and petitioner - Jagdish Nangineni is an employee of Sobha who has appended his signatures on Sobha's behalf on virtually all the documents seized till date.

On the basis of the investigation conducted so far the ED alleges that through dishonest and fraudulent means the petitioners have earned huge profits from the sale of Villas constructed by them on the plots which were required to be allotted on a no profit no loss basis; with an attempt to smoke screen their dishonest acts the petitioners wove a web of agreements; on 25.05.2012 Sobha and co-accused Chintels executed 59 separate agreements to sell 59 NPNL plots to LLPs created by Sobha; since the agreed price for each plot was Rs.48 lakhs (approximately), the cumulative sale consideration payable to Sobha/ Chintels was over Rs.28 crores; such payment was agreed to be made on or before 25.05.2014; on 15.06.2012 the LLPs created by Sobha agreed to sell the aforesaid 59 plots to Eunomia, another LLP created by Sobha; since the agreed sale consideration herein for each plot was about Rs.50 lakhs, the total sale consideration payable inter-se the LLPs created by Sobha was over Rs.29 crores; such payment was to be made by 15.06.2014; between 17.03.2012 and 02.07.2012 Eunomia and Sobha entered into joint development agreements and agreed to share revenue in the ratio 17:83; after construction of the Villas they were sold to the general public not by the final vendor

under the aforesaid agreements to sell i.e. Eunomia but by Sobha and co-accused Chintels; the rates for these Villas were not at NPNL rates but equal to or even higher than rates fixed for Villas sold under the general category and that though as per the conveyance deed each of the Villas had been sold for Rs.3.56 crores, some of the purchasers, on being questioned by the ED, have stated that they have paid Rs.4.25 crores for the same.

The ED alleges that both the petitioners are actively involved in the planning and execution of all the above transactions involving repeated transfer of funds and that since investigations qua the petitioners are still going on this may only be the tip of the iceberg.

As per the afore allegations both the petitioners are accused of serious economic offences. The ED is in the midst of analysing the exact role of each of the petitioners qua the offences they are accused of. Grant of anticipatory bail to the petitioners at this stage would certainly result in putting a spoke in the wheel of the investigating agency and dampen their efforts in elucidating the required information from the petitioners.

In view of the above discussion no merit is found in the present petitions and resultantly, they are both dismissed.

It is clarified that the above observations have been made by this Court to decide the present petitions seeking anticipatory bail in which investigation is still going on and therefore these observations be not construed as opinion on the merits of the case.

02.06.2021*gk***(Deepak Sibal)
Judge**

Whether speaking/ reasoned: Yes/No
Whether Reportable: Yes/No